87-880

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1987

GENERAL ELECTRIC COMPANY,

Petitioner,

—against—

M.V. "NEDLLOYD ROUEN"

—and against—

NEDLLOYD LIJNEN B.V. (NEDLLOYD LINES),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN E. CONE, JR.
Counsel of Record
BIGHAM, ENGLAR, JONES & HOUSTON
Attorneys for Petitioner
14 Wall Street
New York, New York 10005
(212) 732-4646

DOUGLAS A. JACOBSEN
WILLIAM R. CONNOR III
Of Counsel

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Questions Presented

1) Since four different Courts of Appeals have rendered distinct and conflicting decisions concerning what constitutes a "fair opportunity" under the U.S. Carriage Of Goods By Sea Act, 46 U.S.C. 1300 *et. seq.*, ("COGSA"), concerning the rights of shippers to declare values for carriage, is the U.S. Court of Appeals for the Second Circuit correct in differing with three other Circuits, that a shipper is afforded a "fair opportunity" when: a. The bill of lading does not mention COGSA's §1304(5) $500 limitations; b. The bill of lading does not advise that the COGSA limitations can be avoided by declaring a value; and c. The bill of lading requires the ocean carrier's consent to declare a value?

2) Is NEDLLOYD LIJNEN B.V.'s (NEDLLOYD), requirement that Petitioner, GENERAL ELECTRIC COMPANY (GE), pay $75,000 in addition to the freight, in order to declare the actual value of its cargo, ($750,000), unreasonable, unconscionable and excessive when NEDLLOYD could have covered its increased liability exposure by paying its underwriters a mere $282.00?

3) Despite the fact that both opinions, which directly conflict with each other, have been published, the first opinion is the only official stamped opinion appearing in the Second Circuit's file. Does the first opinion of the Appellate Court contain obvious and basic mathematical mis-calculations and mis-interpretations which are so essential to the result reached by that Court that a reversal of this decision is required? Conversely, does the second opinion, which fails to determine whether NEDLLOYD's rate was reasonable, violate the established precedent of this Court?

4) Is the Court of Appeals for the Second Circuit's unprecedented decision correct that a shipper can be estopped from claiming a denial of a "fair opportunity" to declare a value when it has not "inquired" or "took steps" concerning declaring a value?

In compliance with Rule 28.1 of this Court, the following companies are the subsidiaries owned by the General Electric Company which have outstanding publicly held equity or debt securities:

General Electric Credit Corporation
General Electric Credit International N.V.
Canadian General Electric Company, Ltd.
General Electric Overseas Capital Corporation
RCA Corporation

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B. The Appellate Court found NEDLLOYD's ad valorem charge reasonable. In fact, NEDLLOYD's requirement that GE pay $75,000 in addition to the freight, in order to declare the actual value of $750,000, was unreasonable, unconscionable and excessive. NEDLLOYD would have covered its increased liability exposure by paying its underwriter a mere $282. By such a penalty charge, NEDLLOYD effectively precluded GE's right to declare a value pursuant to COGSA and improperly attempted to limit its liability to $500 per package and/or customary freight unit 13

C. In one of the versions of its official opinions concerning this matter, the Court of Appeals for the Second Circuit, at page 1029, made obvious and basic mathematical mis-calculations

and mis-interpretations. These mis-calculations and mis-interpretations involve the singular most important element of the Court's finding that NEDLLOYD's *ad valorem* charge was reasonable. Despite the fact that the Second Circuit in one of its official opinions regarding this case stated that it must determine, in accordance with United States Supreme Court standards, the reasonableness of NEDLLOYD's rate, the Second Circuit issued a second official opinion in which it failed to decide whether NEDLLOYD's *ad valorem* charge was reasonable 23

D. The Appellate Court's decision holding that GE was estopped from contesting NEDLLOYD's unreasonable and illegal *ad valorem* rate because " . . . GE never even inquired about making such a declaration . . . " nor " . . . much less took steps towards actually declaring the value of its cargo", is completely without precedent, vague and differs with other portions of this Court's opinion and that of all decisions dealing with the issue of "fair opportunity" 27

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The order of the Court of Appeals for the Second Circuit, dated July 30, 1987 denying the Petition for Rehearing containing a suggestion for a rehearing *in banc*, is set forth in the Appendix. The two decisions of the Court of Appeals for the Second Circuit, dated May 6, 1987 affirming the District Court's judgment are reported at 817 F.2d 1022 and is set forth in Appendix "A". The opinion of the United States District Court for the Southern District of New York, dated February 28, 1985 entering judgment for petitioner is reported at 618 F. Supp. 62 and is set forth in Appendix "B".

Jurisdiction

Petitioner seeks review of a decision of the Court of Appeals for the Second Circuit, dated May 6, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutes Involved

The United States Carriage of Goods by Sea Act, 46 U.S.C., Sec. 1300 *et. seq.* ("COGSA") is involved in this proceeding and set forth in the Appendix.

Statement of the Case

This case involves the critical issue of what constitutes a "fair opportunity", under COGSA, to declare a value for car-

riage. Billions of dollars worth of international —U.S. commerce are effected by four differing standards of four Circuit Courts of Appeals concerning this issue.

GE brought this action against the NEDLLOYD to recover an estimated $1,000,000 which was the approximate value of a generator auxiliary compartment (hereinafter GAC), and a control cab, which were damaged during sea transportation between Portsmouth, Virginia and Yenbu, Saudi Arabia.

The action was tried before the Honorable Kevin Thomas Duffy, who rendered an opinion on March 3, 1985. The District Court granted NEDLLOYD's motion for partial summary judgment, and limited its liability to $28,500.

GE appealed the judgment of the District Court.

In an opinion dated May 6, 1987, the Second Circuit Court of Appeals affirmed the District Court's finding that liability was limited to $28,500. On July 30, 1987, a petition for rehearing *in banc* was denied.

This petition presents a significant case of first impression having great importance to the United States export/import industries, as well as the maritime insurance community. The fundamental questions presented involve the incontrovertible and absolute right of shippers to declare a value of the goods they entrust to common carriers, and the carriers' statutory obligation to charge reasonable freight rates. Here, the carrier has effectively prevented the shipper from exercising its right to declare a value by imposing an unconscionable charge *26,595.7% in excess of the rate its insurers would have charged to cover the risk*. On these facts, which unfortunately are not unique in the ocean marine industry, the shipper has no choice between limited liability at a reduced freight rate and meaningful and adequate compensation for its losses at reasonable rates.

§1304. Rights and Immunities of Carrier and Ship.

* * *

As part of a contract that GE had with the Saudi Consolidated Electric Company to supply a fully operational electric generating power plant at Yenbu, Saudi Arabia, GE had manufactured a GAC and a control cab to be used in the Saudi project. The GAC and control cab were manufactured in 1983 at GE's plant in Salem, Virginia.

Each of the units was weatherproofed by an enclosure designed to provide thermal insulation, and fire extinguishing medium containment. Further, the enclosures allowed access to the equipment for routine inspections and maintenance and were heated, cooled and lighted as needed. The control cab, as required by Federal regulation, was labeled as containing hazardous material—battery acid. The GAC was shipped "as is", but the control cab had some internal wood bracing placed in it. Additionally the control cab, which weighed approximately 19,232 pounds and was 10 feet long by 18 feet high, had a piece of plywood placed over its air conditioning vent.

The GAC and control cab were placed, by NEDLLOYD, on a NEDLLOYD flatbed equipped with wheels and loaded aboard the roll on, roll off ship, MV NEDLLOYD ROUEN, at Portsmouth, Virginia, on February 16, 1983.

Sometime *after* the GAC and control cab were loaded on the NEDLLOYD ROUEN, NEDLLOYD issued its three page bill of lading, CT 1, covering this shipment. It is uncontested that the GAC and control cab were delivered in good order and condition to NEDLLOYD.

The applicable of lading includes the following pertinent provisions:

3. *CARRIER'S TARIFF.*

The terms of the Carrier's applicable Tariff are incorporated herein. Copies of the relevant provisions of the applicable Tariff are obtainable from the Carrier upon request. *In case of inconsistency between the Bill of Lading and the applicable tariff, this Bill of Lading shall prevail.* * * (emphasis ours)

• • •

5. *CARRIER'S RESPONSIBILITY*

(1) The Carrier shall be liable for loss or damage to the goods occurring between the time when he receives the Goods for transporation and the time of delivery.

6. *THE AMOUNT OF COMPENSATION*

(3) Compensation shall not however exceed US $2.00 per kilo of gross weight of the goods lost or damaged.

(4) Higher compensation may be claimed *only when, with the consent of the Carrier,** the value of the goods declared by the Shipper which exceeds the limits laid down in this clause has been stated in this Bill of Lading. In that case, the amount of the declared value shall be substituted for that limit. Any partial loss or damage shall be adjusted pro rata on the basis of such declared value. *(emphasis ours)

7. *SPECIAL PROVISIONS*

(1) Notwithstanding anything provided for in Clauses 5 and 6 of this Bill of Lading and subject to Clause 18 if it can be proved where the loss or damage occurred the Carrier and the Merchant shall, as to the liability of the Carrier, be entitled to require such liability to be determined

• • •

(b) (i) by the Hague Rules contained in the International Convention for the Unification of Certain Rules Relating to Bills of Lading dated 25th August, 1924, if the loss or damage is proved to have occurred at sea or on inland waterways; for the purposes of this sub-clause the limitation of liability under the Hague Rules shall be deemed to be £100 sterling, lawful money of the United Kingdom per package or unit and references in the Hague Rules to carriage by sea shall be deemed to include references to carriage by inland waterways and the Hague Rules shall be construed accordingly.

10. *DEFENCES AND LIMITS FOR THE CARRIER*

(1) The defences and limits of liability provided for in this Bill of Lading shall apply in any action against the Carrier for loss or damage to the Goods whether the action be founded in contract or in tort.

(2) The Carrier shall not be entitled to the benefit of limitation of the liability provided for in Clause 6, subclause (3) if it is proved that the loss or damage resulted from an act or omission of the Carrier done with intent to cause damage or recxlessly (sic) and with knowledge that damage would probably result.

ADDITIONAL CLAUSES

B. U.S.A. CLAUSE

If this Bill of Lading covers the transportation of goods to or from ports of United States of America, this Bill of Lading shall be subject to United States Carriage of Goods by Sea Act, which shall be incorporated herein, and the provisions of said act shall govern before loading and after discharge and throughout the entire time

> the goods are in the custody of the carrier. If anything herein contained be invalid or unenforceable under the provisions of said act, such circumstances shall not affect the validity or enforceability of any other part or term of this Bill of Lading. The carrier shall not be liable in any capacity whatsoever for loss, damage or delay of or to goods while the goods are not in his actual custody.

Particularly pertinent is the declared value provision found in NEDLLOYD's tariff which is as follows:

> 12. *AD VALOREM CARGO:*
>
> The liability of the carrier as to the value of the shipments at the rates herein provided shall be determined in accordance with the clauses of the carriers' regular bill of lading form. If the shippers desire to be covered for a valuation in excess of that allowed by the Carriers' regular bill of lading form, the shipper must so stipulate in the Carriers' bills of lading covering such shipments and such additional liability only will be assumed by the Carriers at the request of the shipper and upon payment of an additional charge of Ten Percent (10%) of the total declared valuation in addition to the stipulated rate on the commodities shipped (A128).

After leaving Portsmouth, the NEDLLOYD ROUEN sailed for New York to pick up additional cargo. Shortly after departure from New York, the vessel encountered problems with its stabilizers, forcing it to hove to in March weather in the North Atlantic. As a result, GE's cargo, which had been lashed on one flatbed by NEDLLOYD fell off the flatbed and was severely damaged. NEDLLOYD's surveyor reported that the lashing arrangements used to secure the GAC and control cab were not adequate. The first Port of Call of the NEDLLOYD ROUEN after crossing the Atlantic, was Port Said. At Port Said, NEDLLOYD ROUEN's Master and officers inspected

GE's cargo and confirmed the damage. In his report, NEDLLOYD's surveyor stated.

> During the inspection of the cargo, it was considered that the securing arrangements of the cargo on the flatbed trailers were not adequate for the size and weight of the cargo carried in view of the possibility of adverse weather. The lashing arrangements consisted of steel wire and steel bands and this was not considered sufficient to hold the weight of the cargo on the trailers.

Despite the fact that NEDLLOYD knew that GE's cargo had broken free of its lashings on February 18, 1983, and was damaged, GE was not told nor did it discover the damage until March 14, 1983, when it picked up the cargo in Yenbu. At the time of delivery in Yenbu, NEDLLOYD's trailer on which the two units had been stowed was reported to have broken signal lights and flat tires. Because of the trailer's condition, there was a distinct possibility due to battery acid spillage, that continuing damage had occurred after discharge but before pick-up by and delivery to GE.

GE's Traffic Manager, Mr. Anthony Vinci, was not provided with NEDLLOYD's bill of lading until after the NEDLLOYD ROUEN had sailed from Portsmouth. Furthermore, he stated he would have had extreme difficulty in reading the terms and conditions of the bill of lading. NEDLLOYD's Traffic Manager, Mr. Barry Hutton, who had also been in NEDLLOYD's Traffic Booking Customer Service for 14 years as its Line Manager, booked the shipment in question on behalf of NEDLLOYD with Mr. Vinci. The basis for the freight charged by NEDLLOYD was $90 per long ton or 40 cubic feet. The total freight paid by GE to NEDLLOYD for the two units in question was $9,700.

NEDLLOYD's tariff was initially mailed to the Federal Maritime Commission (hereinafter "FMC"), by Mr. Hutton. Sub-

sequent tariff corrections were transmitted to the FMC by a tariff watching service employed by NEDLLOYD in Washington, D.C. Based on Mr. Hutton's extensive experience, the FMC did not question the contents of any particular ocean carrier-tariff other than requirements concerning effective dates for application and abbreviation terminology. Mr. Hutton stated that if a full value were declared it would apply only "tackle-to-tackle", and if any shipper attempted to declare the value for cargo for an entire period of time that NEDLLOYD had the goods, then he could not authorize such a declaration.

If GE had declared the value of its cargo, then NEDLLOYD's charge pursuant to its tariff would have been 10% of the total declared value plus the regular ocean freight. Mr. Hutton stated that any excess value declared was, to NEDLLOYD, somewhat similar to insurance, but was not all risk and would have been subject to all of NEDLLOYD's regular COGSA defenses. Additional, Mr. Hutton never advised any shipper that he could declare a value nor was he aware of any situation where a value had been declared with NEDLLOYD during his 14 years of service as Line Manager of NEDLLOYD's Booking Department. Mr. Hutton stated that if he had been asked about a declared value, he would have had to contact his legal department since it had never happened. Despite his position with NEDLLOYD, Mr. Hutton admitted that he was unaware, until just before his deposition was taken, of any limitation of liability set forth in NEDLLOYD's bill of lading. He had heard of a $500 figure in discussions in NEDLLOYD's claim department as the ". . . *maximum** liability on shipments, claims that had been made". *(emphasis ours).

Ms. Joan Walker, NEDLLOYD's long time Claims Manager, could not read the terms and conditions in the bill of lading because of its small print size. She stated that the bill of lading ". . . has the U.S. Clause which incorporates the Carriage of Goods By Sea Act, which we all know limits it to $500 per package". Ms. Walker was unaware that the bill of lading

failed to contain explicit language with respect to the $500 COGSA limitation. She did not know where the U.S. $2.00 per kilo figure used in the bill of lading had come from, nor did she ever ask, but she believed that the U.S. $2.00 per kilo figure was applicable when COGSA did not apply.

NEDLLOYD could have covered the potential increased liability for cargo with a declared value of $750,000 with its British Underwriter for only $282. This contrasts with the $75,000 in additional freight which NEDLLOYD required pursuant to its published tariff.

Both GE units, after extensive testing and temporary on site repairs, were ultimately put into temporary use at Yenbu, since GE was required to produce electricity with these units until replacements could be provided. Part of the replacements were transported to Yenbu by the National Shipping Company of Saudi Arabia.

Reasons for Granting the Writ

A. The Second Circuit Court of Appeal's decision with respect to what constitutes a "fair opportunity" to declare a value under COGSA, conflicts with holdings of the Fourth, Fifth and Ninth Circuits, which in turn conflict with one another. Under these circumstances, this Court must clarify the law so that the international community can rely on a uniform application of COGSA.

This Court, despite numerous Circuit conflicts in the interpretation of COGSA, has decided only two COGSA cases in the half century since that Act's enactment. *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297 (1959) and *United States* v. *Atlantic Mutual Insurance Co.*, 343 U.S. 236 (1952). On the other hand, since 1927, this Court has decided over 55 Longshoremen's and Harbor Workers' Compensation Act cases, which amounts to approximately one per year.

It is respectfully submitted that the COGSA conflicts that have arisen among the Circuits are intolerable and far more serious than questions which have arisen under the Longshoremen's and Harbor Workers' Compensation Act.

Disputes among the Circuits concerning the interpretation of COGSA involve the issues of "fair opportunity" to declare values; the effects of unreasonable deviations; and the interpretation of the burden of proof of COGSA §1304(2)(b).

The Circuit conflicts do not involve just inconsistent disagreements concerning general principles to be applied. The results being reached by the various Circuits involved are directly contradictory of one another despite the fact that the same, identical problems are discussed. In the area of "fair opportunity", the Fifth Circuit has explicitly acknowledged its disagreement with the Ninth Circuit. *Wuerttembergische* v. *M/V Stuttgart Express,* 711 F.2d 621, 622 (5th Cir. 1983) (per curiam). The Fourth Circuit and other lower courts have also recognized the conflict. *Cincinnati Milacron, Ltd.* v. *M/V American Legend,* 784 F.2d 1161, 1164 (4th Cir.), *superseded* 804 F.2d 837 (4th Cir. 1986) (*in banc*) (per curiam); *E.M.S. Industrie S.A.* v. *Polskie Towarzystow Okretowe,* 608 F. Supp. 1133, 1135 (E.D.N.Y. 1985); *DB Trade Int'l.* v. *Astra Mar,* 592 F. Supp. 1215, 1218 (N.D. ILL. 1984).

The issue of "fair opportunity" under COGSA is the most critical of the Circuit conflicts since the "fair opportunity" requirement determines what the carrier must do prior to shipment in order to rely on COGSA §1304(5)'s $500 limitations of liability in the event of loss or damage to cargo. Four Courts of Appeals have now reached four different standards. The Ninth Circuit requires the bill of lading to recite the language of COGSA §1304(5) so that a shipper will know that it can declare a value higher than $500 per package or customary freight unit. *Nemeth* v. *General S.S. Corp.,* 694 F.2d 609, 611-12 (9th Cir. 1982); *Komatsu, Ltd.* v. *States S.S. Co.,* 674 F.2d

806 (9th Cir. 1982); *Pan Am. World Airways* v. *California Stevedore & Ballast Co.*, 559 F.2d 1173, 1175-77 (9th Cir. 1977) (per curiam). The Fifth Circuit has explicitly rejected the Ninth Circuit's standard in a case where the same bill of lading provisions were involved. *Brown & Root, Inc.* v. *M/V Peisander*, 648 F.2d 413, 419-25 (5th Cir. June 1981) (declining to follow *Pan Am. World Airways* v. *California Stevedore & Ballast Co.*, 559 F.2d 1173 (9th Cir. 1977) (per curiam). In fact the Fifth Circuit has found that choice of rates provided in a carrier *tariff* adequate in providing the shipper with a "fair opportunity" to declare a higher value. *Wuerttembergische* v. *M/V Stuttgart Express*, 711 F.2d 621, 622 (5th Cir. 1983) (per curiam); *Brown & Root, Inc.* v. *M/V Peisander*, 648 F.2d 415, 419-25 (5th Cir. June 1981). The Second Circuit does not believe that a mere choice of rates in a carrier's tariff is sufficient in order to afford a "fair opportunity", but accepts a clause paramount in a bill of lading stating that U.S. law governs the transportation. *Binladen BSB Landscaping* v. *M/V Nedlloyd Rotterdam*, 759 F.2d 1006, 1017 n.12 (2d Cir.), *cert. denied*, 106 S.Ct. 229 (1985). See also the Second Circuit's opinion in the instant matter. The Fourth Circuit, in a reversal of itself, recently held that a "short form" bill of lading that incorporated a "long form" bill of lading with its explicit recitation of COGSA §1304(5)'s language was sufficient to afford a "fair opportunity". *Cincinnati Milacron, Ltd.* v. *M/V American Legend, supra.*

These intolerable conflicts are leading to forum shopping by litigants since cargo owners are free to bring an *in rem* action anywhere they can arrest the vessel involved regardless of whether the claim has any other connection to the forum. Additionally, cargo owners can bring *in personam* actions wherever they can personally serve defendants or attach defendants' property.

It has been widely recognized that the most important aspect of COGSA is supposed to be the uniformity imparted to the

requirements for bills of lading. *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297, 301 (1959). It is elemental that all involved in commercial maritime transactions need to know who bears the risk of a potential loss so that they know what must be insured against and what the costs of that insurance are. When this important risk allocation differs among the various Circuits, each party faces a potential loss or gain depending upon where the case is heard. Billions of dollars of marine cargo enter and depart the U.S. each year.

While the legislation history is crystal clear that COGSA's prime purpose was to unify certain rules of law relating to bills of lading this most important goal of COGSA has not been achieved. *Robert C. Herd & Co.* v. *Krawill Machinery, supra* at 301. Uniformity under the Longshoremen's and Harbor Workers' Compensation Act is infinitely less important than uniformity under COGSA. These COGSA Circuit conflicts must be addressed.

NEDLLOYD's bill of lading, according to the Second Circuit, was sufficient to afford a "fair opportunity" even though it stated, in Clause 6, that a declared value could be had only with NEDLLOYD's consent. Additionally the bill of lading never mentioned COGSA's $500 limitation but, instead, only included deliberately misleading references to a U.S. $2.00 per kilo limitation and a £100 limitation despite the fact that the bill of lading was obviously designed for U.S. trade since it referred to:

> "NEDLLOYD INC.
> 5 World Trade Center
> Suite 617, New York, N.Y. 10048"

in bold print on its front.

Even in its *U.S.A. Clauses*, NEDLLOYD persisted in attempting to improperly restrict its liabilities by stating:

> "The carrier shall not be liable in any capacity whatsoever

for loss, damage or delay of or to goods while the goods are not in its actual custody".

This provision, according to other Second Circuit law is supposedly void. *Allied Chemical International Corp.* v. *Companhia De Navegacao Lloyd Brasileiro,* 775 F.2d 476, 482 (1985). Part of GE's loss occurred *after* discharge when the cargo was not in NEDLLOYD's custody.

B. The Appellate Court found NEDLLOYD's ad valorem charge reasonable. In fact, NEDLLOYD's requirement that GE pay $75,000 in addition to the freight, in order to declare the actual value of $750,000, was unreasonable, unconscionable and excessive. NEDLLOYD would have covered its increased liability exposure by paying its underwriter a mere $282. By such a penalty charge, NEDLLOYD effectively precluded GE's right to declare a value pursuant to COGSA and improperly attempted to limit its liability to $500 per package and/or customary freight unit.

One of the purposes for the enactment of COGSA was to afford shippers just protection in light of the unequal bargaining power that they had with carriers and to simplify and unify bills of lading with clear statutory statements of carrier responsibilities, limitations and immunities. As was stated in the Senate hearings with respect to COGSA:

"MR WHITE.

I may say that one of the outstanding purposes of the proposed legislation is to increase the character and degree of responsibility of the carriers: and the bill was designed in large measure in the interest of the shippers rather than of the carriers." 79 *Cong. Rec.* 3341 (1935).

Further, in pertinent legislative notes, the only two American delegates to the Brussel's conference of 1922 stated:

"We regard the rules as finally formulated at Brussels a beneficial advance upon anything heretofore known in re-

spect of bills of lading. The responsibility of carrier are materially increased; *They will be obliged to cover additional risks by additional insurance.** Whether this diversion (in theory at least) of insurance from the cargo owner to the carrier will result in a corresponding increase in freight rates, or whether competition will keep freight rates down, is something that only experience can make certain.

But such increase in carrier's responsibilities represents the united and insistent desire of shippers and cargo owners as well as of underwriters, not withstanding the fact that the same underwriters will continue to insure the same risks whether the same are assumed by carriers or cargo." H. R. Rep. No. 2218, 74th Cong., 2nd Sess. 1, 4, 5 (1936).

*(emphasis ours)

An overriding consideration appearing throughout the legislative notes regarding the Hague Rules, International Convention for the Unification of Certain Rules Relating to (Ocean) Bills of Lading, 25 August 1924 and COGSA is that these laws be fair, just and reasonable. This, of necessity, included the absolute unrestricted right of shippers to declare a value at reasonable rates. *Mitsui & Co., Ltd.* v. *American Export Lines*, 626 F.2d 807, 815 (2d Cir. 1981).

To have declared a value according to NEDLLOYD's tariff, GE would have had to pay 10% of the value declared plus applicable ocean freight. Assuming, based upon the testimony of the replacement value of the two items damaged, that GE had declared the actual value of $750,000 for the GAC and control cab, GE would have been obligated to pay NEDLLOYD an additional $75,000 despite the fact that NEDLLOYD had a COGSA duty to offer a reasonable alternative rate for a declared value. By NEDLLOYD's own admission it would have paid its British Underwriter, merely $282 to fully cover itself, without a deductible, should loss or damage occur where the declaration of value had been made for $750,000. The differential between NEDLLOYD's payment to its under-

writer and GE's payment to NEDLLOYD for the declared value, would have been *26,559.7%* or *$74,718*. This amount is not a *freight rate*. It is a penalty charge.

Moreover NEDLLOYD testified that such a declaration of actual value would have applied only to that period of time when the GAC and control cab were actually hooked up to the NEDLLOYD ROUEN's tackle for loading until the GAC and control cab were discharged from the NEDLLOYD ROUEN's tackle, *i.e.*, not during tne time the cargo was in the carrier's custody at the ports of loading and discharge. NEDLLOYD's position would be the same at the times it was acting as a bailee at the ports of loading and discharge. See *Allied Chemical International Corp.* v. *Companhia De Navagacao Lloyd Brasileira*, 775 F.2d 476 (2nd Cir. 1985), *cert. den.* March 31, 1986, n.o.r.; *Colgate Palmolive Co.* v. *S/S Dart Canada*, 724 F.2d 313 (2nd Cir. 1983), *cert. den.* 104 S.Ct. 2181 (1984).

This restriction was made by NEDLLOYD even though it had contractually attempted to extend COGSA to periods before loading and after discharge and during the entire time the goods were in its custody. NEDLLOYD has attempted to take advantage of COGSA's limitation of liability during the time the goods were in its custody, and when it was acting as a bailee but where a declaration of value was made, would consider that declaration limited only to "tackle to tackle."

This Court best put the responsibilities of common carriers in its proper context and perspective in *Liverpool & Great Western Steam Co.* v. *Phoenix Insurance Co.*, 129 U.S. 397, 440, 441 (1889) when it stated:

> The employment of a common carrier is a public one, charging him with the duty of accommodating the public in the line of his employment. A common carrier is such by virtue of his occupation, not by virtue of the responsibilities under which he rests. Even if the extent of these responsi-

bilities is restricted by law or by contract, the nature of his occupation makes him a common carrier still.

* * *

The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to higgle or stand out, and seek redress in the courts. He prefers rather to accept any bill of lading, or to sign any paper, that the carrier presents; and in most cases he has no alternative but to do this, or to abandon his business.

Special contracts between the carrier and the customer, the terms of which are *just and reasonable and not contrary to public policy,** are upheld; such as those exempting the carrier from responsibility for losses happening from accident, or from dangers of navigation that no human skill or diligence can guard against; or for money or other valuable articles, liable to be stolen or damaged—unless informed of their character or value; or for perishable articles or live animals, when injured without default or negligence of the carrier. But the law does not allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions which are *unreasonable and improper,** amounting to an abnegation of the essential duties of his employment. *(emphasis ours)

It is well established in common law that a common carrier of goods for hire can reduce its liability by reason of an agreement between a shipper and carrier whereby the carrier's liability is limited to an agreed amount, provided that there is valid and reasonable consideration given by the carrier for the reduction of its liability. The rule in this regard, as set forth in *7 N.Y. Jur. §196* at page 182, is as follows:

Any contract qualifying the common-law responsibility of a common carrier must be supported by a valid and suf-

> ficient consideration, apart from the mere acceptance of the goods for carriage. A provision in a contract of carriage limiting the liability of a carrier from its full liability at common law or by statute without consideration to the shipper by way of a *reduced rate of transportation** or otherwise is unreasonable and void. The consideration ordinarily relied on by the carrier to support a qualification of its common-law liability is a *reduction of the rates of transportation,** and such reduction is a good consideration for a limitation of liability on the part of the carrier. * (Emphasis ours)

See also:

The Ansaldo San Giorgio I v. *Rheinstrom Brothers Co.*, 294 U.S. 494 (1935); *A.C. Lawrence Leather Co.* v. *Compagnie Generale Transatlantique*, 12 F.2d 83 (S.D.N.Y. 1926), *aff'd* 18 F.2d 930 (2d Cir., 1927), *cert den.* 274 U.S. 761 (1927); *New York, New Haven and Hartford Railroad* v. *Nothnagle*, 346 U.S. 128 (1953); *Caten* v. *Salt City Movers & Storage Co.*, 149 F.2d 428 (2d Cir. 1948); *W.R. Grace & Co.* v. *Railway Express Agency Inc.*, 8 N.Y. 2d 103 (1960); *New York & Honduras Rosario Mining Co.* v. *Riddle Airlines*, 3 A.D. 2d 457 (1st Dept. 1957), *aff'd* 4 N.Y. 2d 755 (1958).

In *New York, New Haven and Hartford Railroad, supra*, this Court said, at page 135:

> [O]nly by granting its customers a fair opportunity to choose between higher or lower liability by paying a *correspondingly greater or lesser charge** can a carrier lawfully limit recovery to an amount less than the actual loss sustained. *(emphasis ours)

This Court, in affirming the New York Court of Appeals decision in *Union Pacific* v. *Burke*, at 255 U.S. 317, 321, held that the defendant carrier which had relied on a $100 limita-

tion of liability without affording the plaintiff a choice of shipping at a higher limitation, was liable for the plaintiff's full loss:

> This court has consistently held the law to be that it is against public policy to permit a common carrier to limit its common-law liability by contracting for exemption from the consequences of its own negligence or that of its servants (112 U.S. 331, 338 and 246 U.S. 439, 444, *supra*), and valuation agreements have been sustained only on principles of estoppel and in carefully restricted cases where choise of rates was given—where 'the rate was tied to the release.'

To summarize at common law the common carrier could reduce its liability by agreement with the shipper in consideration for charging a reduced freight. With the involvement of COGSA and regulation of air cargo and interstate surface transportation, the reduced freight rate became the applicable freight rate because a limited liability amount was set forth in the statutes, such as the $500 package limitation in COGSA §1304(5). In all of these transportation areas, the limitations set forth are subject to the requirement that the carrier offer the shipper a fair and reasonable opportunity to declare a higher value. Previously, the carrier had to obtain consent for a limited liability, but when the statutes came into being the carrier automatically had limited liability unless the shipper specifically declared a value *provided the carrier had offered a fair opportunity to declare such a value.*

The problem in this case is that the opportunity offered the shipper to declare a value is not fair and reasonable. It is so unconscionable as to effectively deny the shipper any opportunity to declare a value higher than the statutory amount. While the mechanics with respect to limitation of liability have changed, the basic principle of the shipper's right to be able to recover full value has not. The practical result is that NEDLLOYD has illegally attempted to reduce its COGSA liability, in all instances, to $500.

In determining whether a choice of rates was valid, the courts have consistently considered the following:

1. Whether the carrier's bill of lading gave notice of the shipper's right to declare a value. *General Electric* v. *Lady Sophie*, 458 F. Supp. 620 (S.D.N.Y. 1978); *Pan American World Airways* v. *Cal. Stevedore & Ballast*, 559 F.2d 1173 (9th Cir. 1977); *Komatsu Ltd.* v. *State S.S. Co.*, 674 F.2d 806 9th Cir. 1982); *Hanover Ins. Co.* v. *Schulman Trans. Enterprises, Inc.*, 581 F.2d 268 (1st Cir. 1978); *Federal Ins. Co.* v. *Transconex*, 430 F. Supp. 290, 295 (D.P.R. 1976).

2. Whether the bill of lading terms have been fairly entered into. *Hart* v. *Pennsylvania R.R. Co., infra* at 337; *A.C. Lawrence Leather Co.* v. *Compagnie Generale Transatlantique*, 12 F.2d 83, 85 (1926). Here, it should be kept in mind that the bargaining powers between shippers and carrier are vastly unequal and that bills of lading have been consistently characterized as contracts of adhesion by this Court. *Encyclopaedia Britannica* v. *S.S. Hong Kong Producer*, 422 F.2d 7, 15 (2nd Cir. 1969), *cert. denied*, 397 U.S. 964 (1969); *Cabot Corp.* v. *S.S. Mormacscan*, 441 F.2d 476, 478 (2nd Cir. 1971), *cert. den., sub nom.* 404 U.S. 855 (1971); *Allied Chemical International Corp.* v. *Companhia De Navegacao Lloyd Brasileiro, supra* at 482.

3. Whether the alternative rates are *freight* rates; *Chester* v. *Maritima del Litoral S.A.*, 586 F. Supp. 192, 195 (ED Wisc., 1983); *The Merauke*, 31 F.2d 974, 975 (2nd Cir. 1929); *Pan American World Airways* v. *Cal. Stevedore & Ballast, supra* at 1177; *General Electric* v. *M.V. Lady Sophie, supra* at 622; *Hart* v. *Pennsylvania Railroad, supra* at 337.

4. Whether the alternative rates provisions are *fair* and *reasonable* and have ". . .a due relation one to the other, and that if a greater value had been declared a higher and not unreasonable charge for the carriage would have been made. [*Hart* v.

Pennsylvania Railroad Co., 112 U.S. 331]." *The Kensington*, 183 U.S. 263, 272 (1901). In *Adams Express Co.* v. *Croninger*, 226 U.S. 491, 509-510 (1912), this Court stated:

> It has therefore become an established rule of the common law as declared by this court in many cases that such a carrier may by a *fair, open, just and reasonable** agreement limit the amount recoverable by a shipper in case of loss or damage to an agreed value made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk. *(emphasis ours)

This Court in the *Adams Express Co.* v. *Croninger* case, *supra*, set forth the standard by which the higher freight rate was to be measured; that standard was one *directly commensurate with the risk involved and must be reasonable.*

NEDLLOYD's demand of $75,000 for a declaration of value of $750,000 can, under nor circumstances, be considered fair, open, just and reasonable. NEDLLOYD's charge of $75,000 can not be considered a freight rate. It bears no resemblance to either the proportion of the risk assumed, or to the freight rate of $9,700. In short, it is a penalty charge.

AIR CARGO COMPARISON

The law with respect to declarations of value with common carriers has been consistently and properly followed by air cargo carriers. As Mr. Charles Robus testified, air carriers charge freight rates for declaring a value directly commensurate with the cost of obtaining insurance to cover their increased monetary liability. As a result, approximately 50% of all air cargo transported to and from the United States involves declarations of value.

Mr. Robus is an expert on aviation insurance and claims and is the manager of International Claims for Frank B. Hall & Com-

pany, which for many years has been one of the largest brokers in the marine insurance industry. He explains the reason for the large number of declarations of value in air carriage transportation of cargo, and the reason why no ocean shipper would ever declare a value with NEDLLOYD under the present circumstances. Mr. Robus stated:

> The normal limitation of liability in the international air carriage of cargo is $20 per kilo for shipments to and from the United States. The rates for declaration of value and shipper's interest insurance are rates *directly* predicated upon the cost to the air carrier of obtaining insurance coverage to protect the air carrier because of the additional liability exposure via a declaration of value of a shipper's interest insurance declaration. For example, if the air carrier's rate to shippers for declaring a value was 30¢ per $100, the insurance charge to the air carrier, based upon my experience, would be approximately 25¢. The 5¢ excess would go into the carrier's coffer to make up for the deductible applicable under the policy of insurance. If the rate were $1.00 for declaring a value, the insurance charge, based upon my experience would be 50¢ to 75¢, with the additional 25¢ to 50¢ excess again going into the carrier's coffer to offset any deductible.
>
> • • •
>
> I have read provision 12 'AD VALOREM CARGO' of NEDLLOYD's Freight Tariff No. 6 FMC 78, applicable to the subject shipment and in my experience, the method of constructing the rate for declaring a value for carriage of a shipment is not only restrictive, but the ensuing cost of 10% of the declared value, plus ocean freight makes it prohibitive and thus would effectively forestall any shipper from ever declaring a value. I have never found anything analogous to this provision in declaration of value for the air carriage of cargo.

Additionally, Mr. Robus explained that shippers who have all risk insurance, often declare values for their cargo in order to keep their own insurance premium at a minimum. He stated:

> Additionally, shippers may prefer, for the reasonable and nominal cost involved, to spare their own loss experience from resulting in additional premium charges for their own cargo insurers.

A substantial amount of litigation concerning COGSA §1304 (5)'s package and freight unit limitations could have been avoided if ocean carriers had followed this same fair, open, just and reasonable policy. Obviously, if reasonably higher rates were available, many of the same shippers who also utilize air transportation would have chosen to declare actual values for their ocean cargo.

While the Second Circuit paid lip service to this Court's clear mandate that an *ad valorem* charge must be reasonable and cited, at page 1028 of its opinion, *Hart* v. *Pennsylvania Railroad Co.*, 112 U.S. 331, 341-42 (1884), it incredibly found NEDLLOYD's *ad valorem* charge to be reasonable. The Appellate Court's admitted, sole guidance was the *Hart* opinion of this Court.

C. In one of the versions of its official opinions concerning this matter, the Court of Appeals for the Second Circuit, at page 1029, made obvious and basic mathematical mis-calculations and mis-interpretations. These mis-calculations and mis-interpretations involve the singular most important element of the Court's finding that NEDLLOYD's ad valorem charge was reasonable. Despite the fact that the Second Circuit in one of its official opinions regarding this case stated that it must determine, in accordance with United States Supreme Court standards, the reasonableness of NEDLLOYD's rate, the Second Circuit issued a second official opinion in which it failed to decide whether NEDLLOYD's ad valorem charge was reasonable.

Rather bizarrely, the Second Circuit has issued two official and conflicting opinions in connection with this matter, each of which is dated May 6, 1987. Neither opinion is marked "corrected." Both opinions have been published and the first of the two opinions is commented on below. The opinion that is commented on, aside from having been published, is currently the only official opinion, duly stamped, appearing in the Second Circuit's file and the only opinion the Second Circuit has advised counsel is in existence. The second opinion appears, for the first time, in the West Publishing Company's bound volume, although West's paperbound volume contains the original opinion.

In well reasoned language, at page 1028 the Court correctly stated:

> Next, in order to decide whether Nedlloyd denied GE a fair opportunity to declare value we examine the applicable common law principles. A carrier must provide a shipper with a "fair opportunity" to declare excess value. Only by granting shippers a fair opportunity to choose between paying a greater or lesser charge to obtain corresponding more or less protection for its goods may a carrier limit its liability to an amount less than the loss actually sustained. *See New York, New Haven & Hartford*

Railroad Co. v. *Nothnagle,* 346 U.S. 128, 135 (1953). Absent fair opportunity, a carrier loses the benefit of any limitation of liability to which it otherwise might be entitled. *See, e.g., Komatsu Ltd.* v. *States Steamship Co.,* 674 F.2d 806 (9th Cir. 1982).

Fair opportunity, as developed in decisional law, comprises several different elements, two of which are present in this case. The first concerns whether the carrier has given adequate notice of the limitation of its liability to the shipper, thereby affording the shipper means of avoiding such limitation. The adequacy of notice in Nedlloyd's bill of lading will be discussed in part III. The means of avoiding the carrier's limitation of liability is, of course, for the shipper to declare the value of its goods. Once a shipper exercises this right, it must then pay an *ad valorem* charge.

The second element of the fair opportunity inquiry focuses on the *ad valorem* charge itself. As articulated in the leading case on this subject, a carrier must offer the shipper an *ad valorem* charge that is *reasonable.** *See Hart* v. *Pennsylvania Railroad Co.,* 112 U.S. 331, 341-42 (1884). *Hart* teaches that the reasonabless of the *ad valorem* rate is measured by the amount of risk assumed, i.e., the declared value of the goods. *See id.* at 340. "The principle is that the charge should bear some reasonable relationship to the responsibility, and that the care to be exercised shall be in some degree measured by the bulk, weight, character and value of the property carried." *Adams Express,* 226 U.S. at 510. Because the only factor of those enumerated that is different when a shipper makes a declaration is the value of the cargo. *Adams Express* states that the risk assumed by the carrier is measured by the declared value. We consider therefore the reasonableness of Nedlloyd's *ad valorem* rate. * (emphasis ours).

From the foregoing, it can clearly be seen that the Court recognized that the reasonabless of NEDLLOYD's *ad valorem* charge determined whether NEDLLOYD had provided a "fair opportunity" to declare a value. The Court also recognized its responsibility in determining whether NEDLLOYD's *ad valorem* rate was reasonable.

The *only* part of the decision dealing with the crucial issue of the reasonableness of NEDLLOYD's *ad valorem* rate is set forth at page 1029, where it is stated:

> As noted earlier, GE's attempt to avoid COGSA's $500 limitation consists principally of an attack on the reasonableness of Nedlloyd's *ad valorem* 10% rate on total declared value. Our research disclosed no cases in which an *ad valorem* rate has been indicted as constituting a prohibited means by which a carrier attempted to limit its liability. GE's argument is unique in this respect. In fact, there are a number of cases where *ad valorem* rates *greater than** Nedlloyd's apparently did not raise any eyebrows. *See, e.g., Missouri Pacific Railway Co.* v. *Harper Brothers,* 201 F. 671, 672 (7th Cir. 1912) (25% *ad valorem* rate); *Latta* v. *Chicago, St. Paul, Minneapolis & Omaha Railway Co.,* 172 F. 850, 852 (8th Cir. 1909), *rev'd on other grounds,* 226 U.S. 519 (1913) (25% *ad valorem* rate for the first $800 of declared value; *Missouri, K. & T. Railway Co. of Texas* v. *Patrick,* 144 F. 632, 632-33 (8th Cir. 1906) (regular freight rate reduced by 33% if shipper accepted limitation of liability). *(emphasis ours)

Aside from the fact that the three cases cited are rather old railroad cases all pre-dating COGSA, and thus should have little bearing on the issue of the reasonableness of NEDLLOYD's *ad valorem* charge, the percentages mentioned for each of these cases differ *significantly and considerably* from the *ad valorem* rate NEDLLOYD offered GE.

The two 25% *ad valorem* rates and the 33% reduction specified at page 13a of the Court's opinion are, in fact, rates *less than* NEDLLOYD's *ad valorem* charge. A review of the cases cited by the Court, at page 1029, clearly shows that the two 25% *ad valorem* rates involve *an increase of 25% in the base transportation freight rate.* The 33% figure is actually a *reduction of 33% in the base freight rate.* As mentioned earlier, the base freight rate for the transportation of GE's cargo by NEDLLOYD was $9,700. An increase of 25% in that freight rate would have amounted to $2,425, a difference of $72,575 less than the rate NEDLLOYD would have charged here. The case involving the 33% decrease in the *base freight rate* speaks for itself, and obviously has nothing whatsoever to do with the type of charge assessed by NEDLLOYD. What the Court has unfortunately done is tantamount to comparing apples to oranges. It has equated NEDLLOYD's charge of *10% of the value of the cargo with charges of 25% increase in the base freight rate, and 33% reduction in the base freight rate.* Simple mathematical computation reveals the obvious error.

Accordingly the only cases relied upon by the Court as a basis for its decision are *completely irrelevant* to the issue of *reasonableness.*

As the Second Circuit previously stated, a carrier's limitation is valid ". . . so long as the limitation was granted by the shipper in consideration for a lower *rate of freight** than would *reasonably** be charged for the carrier's unlimited liability." The Court also stated that the base freight rate and the higher freight rate must ". . . bear a *reasonable** relationship one to another." *Shippers Nat. Freight Claim Council* v. *I.C.C.*, 712 F.2d 740, 746, 747 (2d Cir. 1983). *(emphasis ours)

Obviously, we do not know which Second Circuit opinion, if any, is controlling. It seems elemental that the Second Circuit *had* to decide whether NEDLLOYD's rate is reasonable in compliance with the standards of this Court and, therefore, the

second, apparently official opinion of the Second Circuit, is erroneous and conflicts with established United States Supreme Court precedent.

D. The Appellate Court's decision holding that GE was estopped from contesting NEDLLOYD's unreasonable and illegal ad valorem rate because ". . . GE never even inquired about making such a declaration . . ." nor ". . . much less took steps towards actually declaring the value of its cargo", is completely without precedent, vague and differs with other portions of this Court's opinion and that of all decisions dealing with the issue of "fair opportunity".

It is irrelevant whether GE has, in the past, declared a value for marine transportation. As previously noted the law requires NEDLLOYD to offer a fair, just and reasonable alternative freight rate for declaring a value to every shipper, large or small, on every occasion.

The Appellate Court's assertion that GE never declared a value with respect to ocean shipments was wrong and gratuitous because there is absolutely nothing in the record to support any contention that GE never declared a value. In any event, it was NEDLLOYD's legal burden to establish that it offered a fair, reasonable, open and just choice of rates; *Komatsu, Ltd.* v. *States S.S. Co., supra* at 809; *D. B. Trade International, Inc.* v. *Astromar, supra* at 1218; *Bumble Bee Seafoods* v. *S.S. Kiku Maru,* 1978 A.M.C. 1586 at 1588; and a "fair opportunity" to declare a value; *Tessler Brothers (B.C.) Ltd.* v. *Italpacific Line,* 494 F.2d 438, 443 (9th Cir. 1974); *New York, New Haven & Hartford Railroad Co.* v. *Nothnagle, supra* at 135.

To have a new rule of law requiring a shipper to "inquire" about making a declared value and/or to "take steps" towards actually declaring the value of the cargo sets up a novel and vaguely unique procedue for shippers to follow before arguing, in court, that they have been deprived of a "fair opportunity" to declare values for their cargoes because of unreasonable and

illegal *ad valorem* charges. We believe there should be one rule of law applicable to all shippers. The carrier's tariff was filed with the U.S. Government, as required by law, and thus gave constructive notice to GE. This is a take it or leave it. *Isbrandtsen Co.* v. *United States,* 201 F.2d 281 (2d Cir. 1953); *Sommercorp* v. *Panama Canal Company,* 475 F.2d 292 (5th Cir. 1973); *Brown & Root* v. *M/V Peisander,* 648 F.2d 415 (5th 1981). The carrier did not negotiate with GE before it filed its unreasonable and unlawful tariff. By unilateraly filing its tariff, it left itself open to just the kind of an attack GE makes in this case. The unlawful act was committed by the ocean carrier—not by GE. The law is being turned upside down when the victim, rather than the unlawful perpetrator, is held to be estopped.

GE's argument has never been that it did not know or should not have been charged with knowledge of NEDLLOYD's rate for declaring a value. GE's argument is that, *even with knowledge.* NEDLLOYD's *ad valorem* rate was so exorbitant that GE could not possibly have been considered attempting to declare a value. What conceivable difference would it have made had GE "inquired" or "took steps" toward declaring a value? The plain fact of the matter was and is that such a declared valuation was completely and utterly *impossible* and therefore NEDLLOYD *illegally* limited its liability in all instances to $500 per package or per customary freight unit and thus failed to offer GE a "fair opportunity" to declare a value.

All of the cases dealing with "fair opportunity" to declare a value indicate very clearly that the "fair opportunity" must be afforded by the carrier in the first instance. *New York, New Haven and Hartford Railroad* v. *Nothnagle,* 346 U.S. 128 (1953); *Tessler Brothers (B.C. Ltd.)* v. *Italapacific Line,* 494 F.2d 438 (9th Cir. 1974); *Komatsu Ltd.* v. *States S.S. Company,* 674 F.2d 806 (9th Cir. 1982); *Pan American World Airways* v. *Cal. Stevedore & Ballast,* 559 F.2d 1173 (9th Cir. 1977). Either the "fair opportunity" exists, or it does not, and

this is not dependent upon actions or omissions of shippers. Either the *ad valorem* charge is legal or it is not, and this is not and *never* was held to be dependent upon actions or omissions of shippers. As stated by the Second Circuit in the instant case, at page 2878, ". . . common law principles require a carrier to provide a shipper with a fair opportunity to declare a value greater than $500 . . .", and at page 2887, as articulated in the leading cases on this subject, "a carrier *must offer* a shipper an *ad valorem* charge that is reasonable."* *(emphasis ours).

The plain and unrefuted facts involving "fair opportunity" and NEDLLOYD's unreasonable and illegal *ad valorem* charge, which are fully supported by the Record of this case, are:

a. NEDLLOYD's charge to GE for declaring the actual value of GE's cargo would have been $75,000;

b. NEDLLOYD's *ad valorem* charge to GE would have been in addition to its regular base freight charge which was $9,700;

c. NEDLLOYD admitted that it could have insured its increased liability exposure if GE had declared the value of its cargo *for a mere $282*;

d. Any declared value that NEDLLOYD would have provided was applicable "tackle to tackle" only and subject to all of NEDLLOYD's regular defenses, except limitations of liability;

e. GE contends that additional damage to its cargo occurred after discharge when, by NEDLLOYD's admission, GE could not have declared a value;

f. GE's all risk marine insurance charge was one-half of one percent of the value of the cargo, or $3,750. This charge was for all risk warehouse to warehouse coverage. (Compare this with NEDLLOYD's charge of $75,000 for *limited* tackle to tackle coverage and NEDLLOYD's underwriter's charge of *$282.*);

g. NEDLLOYD's charge of $75,000 plus $9,700 *was not an alternative freight rate* charge but a *penalty charge* designed to limit NEDLLOYD's liability in all instances to $500 per package, or per customary freight unit.

While the Court speaks of GE having made a "business judgment" (page 1029), not to declare a value, and "GE's own cost-benefit analysis" (page 1029), there is no evidence of any "cost-benefit analysis" or "business judgment" having been made by GE. The plain fact is that no shipper in his right mind, experienced or inexperienced, sophisticated or unsophisticated, rich or poor, large or small, would *ever* even attempt to declare a value under these circumstances.

When NEDLLOYD's counsel, during the argument of this appeal, stated that if he were GE he would have to be out of his mind to pay $75,000 in extra charges.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision of the Court of Appeals herein.

Respectfully submitted,

JOHN E. CONE JR.
Counsel of Record

BIGHAM, ENGLAR, JONES & HOUSTON
Attorneys for Petitioner
14 Wall Street
New York, New York 10005
(212) 732-4646

DOUGLAS A. JACOBSEN
WILLIAM R. CONNOR III
Of Counsel

APPENDIX A

Opinion of Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 90 — August Term, 1986
(Argued October 8, 1986 Decided May 6, 1987)
Docket No. 86-7376

GENERAL ELECTRIC COMPANY,
Plaintiff-Appellant,

—v.—

MV NEDLLOYD, her engines, boilers,
NEDLLOYD LIJNEN B.V. (NEDLLOYD LINES),
Defendant-Appellees.

Before: LUMBARD, CARDAMONE and PIERCE,
Circuit Judges

Appeal by General Electric Company from a judgment entered May 1, 1986 in the United States District Court for the Southern District of New York (Duffy, J.) that held appellee, Nedlloyd Lijnen B.V. (Nedlloyd Lines), *et ano.*, liable for damage to appellant's cargo, but limited recovery pursuant to the provisions of the bill of lading.

Affirmed.

JOHN E. CONE, JR., New York, New York (Douglas A. Jacobsen, William R. Connor III, Bigham, Englar, Jones & Houston, of Counsel), *for Plaintiff-Appellant.*

J. SCOT PROVAN, New York, New York (Arthur E. Hoffmann, Jr., Kirlin, Campbell & Keating, of Counsel), *for Defendant-Appellee.*

Opinion of Court of Appeals for the Second Circuit

CARDAMONE, *Circuit Judge*:

This appeal presents a unique challenge to an ocean carrier's limitation of liability under its bill of lading. Guiding our analysis are centuries old maritime principles of carriage, derived from the customs of the law merchant, the resilient strands of which were woven into the cloth of the common law where these principles survive today. General Electric (GE) appeals from a judgment entered on May 1, 1986 in the United States District Court for the Southern District of New York (Duffy, J.). That judgment was a disappointing victory for GE because though the district court held Nedlloyd Lijnen B.V. (Nedlloyd) liable for damage to GE's cargo, it limited that liability pursuant to a provision in Nedlloyd's bill of lading. We affirm.

BACKGROUND

A. *Historical Overview*

It is helpful to the discussion that follows to put in context the law that limits a carrier's liability and the opportunity for a shipper like GE to avoid those limitations. The absolute liability of a carrier of goods by sea under 18th century law—save for several exceptions—made it, in effect, an insurer of the cargo's safe transit. *See* G. Gilmore & C. Black, *The Law of Admiralty* § 3-22 at 139-40 (2d ed. 1975). The increasing use of bills of lading during the 19th century occurred, in part, because under these instruments carriers could limit their liability. But such attempts to limit liability were unavailing when loss of cargo arose from a failure of the carrier to use due care since contracts exonerating carriers from liability were held to violate public policy. *First Pennsylvania Bank* v. *Eastern Airlines, Inc.*, 731 F.2d 1113, 1116 (3rd Cir. 1984). The obligation to use due care is now imposed by statute, 46 U.S.C.

§§ 1303(1) and (2) (1982), so that a carrier cannot by contract exculpate itself from this duty in providing a seaworthy vessel or in handling or shipping cargo.

In 1921 the Hague Rules adopted this view of a carrier's liability. These Rules—as amended by the Brussels Convention of 1924—were adhered to by the United States in 1936. In that same year Congress passed the Carriage of Goods by Sea Act (COGSA) ch. 229, 49 Stat. 1207 (codified at 46 U.S.C. §§ 1300-15 (1982), which adopted the Hague Rules. COGSA allows freedom of contract outside its provisions only if a carrier's liability is increased, not reduced. Gilmore & Black, *supra*, § 3-25 at 145. Consequently, a carrier's liability for cargo damage today has gone from one extreme to the other—from absolute liability to liability predicated only on a showing of fault.

In regulating ocean bills of lading under COGSA, Congress created federal law governing the terms of transport of goods by sea. COGSA restricts a carrier's ability to limit its liability under its bill of lading. Section 1304(5) of that statute establishes a minimum floor of a carrier's liability: $500 "per package . . . or . . . customary freight unit." From the standpoint of a shipper the $500 also acts as a ceiling for its recovery in the event of damage or loss of its cargo. Unless the shipper declares a higher value for its goods, it may not recover an amount greater than $500 per package. As discussed more fully below, common law principles require a carrier to provide a shipper with a fair opportunity to declare a value greater than $500—the so-called "excess value" or "declared value". For this purpose a space is usually provided on the front of a bill of lading for a shipper to use in declaring excess value. Because such a declaration increases a carrier's liability, it is entitled to charge more for its carriage. This additional charge—called an *ad valorem* rate—is the subject of this appeal.

B. *Facts*

The facts may be stated briefly. In 1983, during the course of building an electric generating plant in Saudi Arabia, GE needed certain equipment to be shipped from America and booked space for its transport with Nedlloyd, an ocean carrier. GE's Manager for Export Ocean Transportation did not inquire about declaring an excess value, nor did Nedlloyd apprise GE that it could declare excess value although the bill of lading contained a box for excess valuation. Had GE declared such excess, it would have been required to pay a 10% charge on the total value of the goods shipped in addition to the customary freight charge. GE states that its cargo had a value of $750,000—thus the 10% *ad valorem* rate would have resulted in a $75,000 charge—in addition to the $9,700 freight charge paid to Nedlloyd. This excess or *ad valorem* charge was contained in a tariff filed by Nedlloyd with the Federal Maritime Commission.

The cargo consisted of 26 items of equipment being shipped from Portsmouth, Virginia to Yenbu, Saudi Arabia. The two damaged items that prompted this suit were loaded on a flatbed trailer equipped with wheels and rolled aboard the M.V. *NEDLLOYD ROUEN*. One of the items was a Generator Auxiliary Compartment cab shipped "as is" and the other was a 10-ton control cab, ten feet long and 18 feet high. On February 16, 1983 Ncdlloyd issued a bill of lading, the front of which had the customery space for declaring excess value. Language in this space referred to a clause on the back of the bill of lading. That clause purported to limit Nedlloyd's liability to L 100 sterling per package or unit of weight. But another clause on the back of the bill of lading—entitled the "U.S.A. Clause"—stated that COGSA governed if the bill of lading "cover[ed] the transportation of goods . . . from ports of

United States of America." That clause incorporated by reference various provisions of COGSA, including § 1304(5).

The *NEDLLOYD ROUEN* sailed from New York on February 18, 1983 and a day or two later encountered gale winds and stormy winter weather in the North Atlantic. When the *NEDLLOYD ROUEN* began rolling and heaving, GE's two cabs broke free from their lashings, fell onto the deck from the flatbed trailer, and were damaged. Following unsuccessful repair attempts, the damaged equipment was later replaced by two new units.

C. *Proceedings Below*

A year later GE sued Nedlloyd for one million dollars. Nedlloyd answered and moved for partial summary judgment claiming that COGSA's $500 limitation applied. GE responded that Nedlloyd's *ad valorem* rate was unreasonably high compared to Nedlloyd's cost of obtaining additional insurance sufficient to cover the greater risk to Nedlloyd had GE declared excess value. GE also argued that the bill of lading should have mentioned explicitly COGSA's $500 limitation, rather than merely incorporating it by reference. Finally, GE urged that the print on the back of the bill of lading—where the "U.S.A. Clause" was located—was illegible because it was too small to read.

The district court granted Nedlloyd's motion and summarily rejected GE's latter two contentions. It found that Nedlloyd bill of lading "clearly contained" a space for declaring excess value and provided sufficient notice that COGSA's limitation applied. It further held that the issue of the print size was irrelevant to the question of whether GE received adequate notice of its right to declare excess value.

The district court also rejected GE's first contention that Nedlloyd's rate was unconscionably high for two reasons. First, it was unconvinced that the *ad valorem* rate prevented GE from declaring excess value. Citing Diplock, *Conventions and Morals —Limitation Clauses in International Maritime Conventions,* 1 Journal of Maritime Law and Commerce, 525, 529-30 (1970) (Diplock), the court stated that if it were actually more economical for carriers rather than shippers to insure the excess value, then *ad valorem* rates would reflect this fact and, as a consequence, be lower than they are. Thus, because Nedlloyd's *ad valorem* rate exceeded what it cost GE to insure its cargo, it was not the *ad valorem* rate but the economics of insuring the cargo that prevented GE from declaring excess value. Judge Duffy additionally found that GE had no intention of declaring an excess value for its cargo. For this finding, the district court relied on GE's Export Ocean Transportation Manager's statement that in 43 years of working in the transportation department he had never known GE to declare excess value.

Following the district court's disposition of its motion, Nedlloyd consented to an entry of judgment against it for $28,500 plus interest.[1] GE appeals challenging the rulings that Nedlloyd's *ad valorem* rate was reasonable and that its bill of lading provided adequate notice of the COGSA limitation. Before discussing these issues, we consider the threshold question of jurisdiction.

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[1]One of the two items was found by the district court to be a single "package" subject to the $500 limitation. The other was charged on the basis of 40 cubic foot units of which it had 56 units x $500 or $28,000. Appellant takes no issue with this computation of $28,000 if the COGSA limitation applies.

DISCUSSION

I THE JURISDICTIONAL ISSUE

A. *Primary Jurisdiction Generally*

Nedlloyd argues that GE's challenge to its *ad valorem* rate essentially involves an attack on its reasonableness. As such, Nedlloyd continues, under the doctrine of primary jurisdiction the Federal Maritime Commission (FMC) is the proper body to pass on that complaint first.[2]

Primary jurisdiction is a doctrine that is used to determine whether a given issue should be passed on first in a judicial or administrative forum. In other words, it fixes priority for passing on a given issue. While administrative expertise is a factor that a court considers in deciding whether it should take initial jurisdiction, *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, 64 (1956), the principal reason why such a doctrine exists is to encourage a court and agency to act in coordination with one other. *See* 3 K. Davis, *Administrative Law*, § 19.01 at 5 (1958). Thus, when Congress has entrusted the regulation of certain subject matter under a statute to an

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[2]Nedlloyd's request that the doctrine of primary jurisdiction be invoked is inconsistent with its argument that the judgment appealed from be affirmed, since the district court ruled in Nedlloyd's favor on the reasonableness of the *ad valorem* rate. In fact, the district court's conclusion that the rate was reasonable was central to its holding that GE had been afforded a fair opportunity to declare excess value. If, as Nedlloyd suggests, deference to the FMC is the order of the day, then the court below also should have deferred to that administrative body, and Nedlloyd should be urging not affirmance, but reversal. Nonetheless, for the reasons discussed, we find no basis to reverse, nor any error in the district court's passing on the reasonableness of Nedlloyd's *ad valorem* rate.

administrative agency, it is often counterproductive for a court to act upon that subject matter without the benefit of knowing what the agency has to offer. Beyond that, courts and administrative agencies should not act at cross purposes lest they become "wholly independent and unrelated instrumentalities of justice, each acting . . . without regard to the appropriate function of the other." *United States* v. *Morgan*, 307 U.S. 183, 191 (1939).

There is no fixed formula for deciding when the doctrine applies. *Western Pacific Railroad*, 352 U.S. at 64. Analysis is on a case-by-case basis. But courts ordinarily do not defer when the issue involved is purely a legal question, one not involving agency expertise or experience. *Board of Education* v. *Harris*, 622 F.2d 599, 607 (2d Cir. 1979), *cert. denied*, 449 U.S. 1124 (1981). In determining whether to defer, courts should determine "whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *Western Pacific Railroad*, 352 U.S. at 64.

B. *Application of Primary Jurisdiction Doctrine*

Thus, we examine the factors upon which the existence of the doctrine rests to determine whether deferral is appropriate. Before applying these factors, it should be noted that the posture of the instant case distinguishes it from the one upon which Nedlloyd principally relies in urging that the doctrine of primary jurisdiction be applied, *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474 (1932). In *Cunard*, the Supreme Court affirmed the dismissal of the petitioner's request for injunctive relief. The Court held that the petitioner's challenge to a group of carriers' freight rates was within the FMC's primary jurisdiction. *See id.* at 481-85. There, peti-

tioner charged that respondent's rates interfered with commerce by operating to "exclude [petitioner] entirely from the carrying trade between the United States and Great Britain." *Id.* at 480. The FMC is considered to have the expertise to answer this question, as its statutory mandate directs it to examine whether rates are "so unreasonably high or low [as] to be detrimental to the commerce of the United States." 46 U.S.C. § 817(b), *repealed by* The Shipping Act of 1984, Pub. L. No. 98-237, § 20(a), 98 Stat. 67, 88. In contrast, GE challenges Nedlloyd's rates as effectively eliminating its right to declare a higher value for its cargo, a question which, as we shall develop more fully, does not similarly fall within the bounds of the FMC's area of expertise. Consequently, *Cunard* does not require court deferral of GE's challenge, but it does point up the need to determine the applicability of the doctrine of primary jurisdiction.

One factor already noted is the need for uniformity and consistency in the regulation of business entrusted to a particular agency. *See Far East Conference* v. *United States*, 342 U.S. 570, 574 (1952). Since actions challenging an individual carrier's *ad valorem* rates are like rare birds—seldom, if ever, seen—there is little danger that the uniformity or consistency of the regulatory scheme will be set at odds because a court first considers the issue. In fact, neither party has cited a single action challenging an individual carrier's *ad valorem* rates either before the FMC or the federal courts. Nor has research uncovered any. This lack of case law is not surprising in view of the limited power given the FMC by the Shipping Act of 1916. As we observed in another context: "[T]he Shipping Act [of 1916] is a very limited regulatory scheme. It imposes only a few general duties, and the central purpose of the statute was to provide for industry self-regulation. . . ." *Square D. Co.* v. *Niagara Frontier Tariff Bureau*, 760 F.2d 1347, 1362 (2d Cir. 1985), *aff'd*, 106 S. Ct. 1922 (1986).

Moreover, the legislative history of the Shipping Act of 1984 again reflects the limited role that the FMC has played in regulating this particular aspect of the maritime industry. In discussing § 817(b)(5)—the substantive section of the 1916 Act implicated by a challenge to the reasonableness of an *ad valorem* rate—a House Report stated: "[T]he FMC can investigate specific violations of the Shipping Act; however, except for a seldom exercised power to disapprove rates found to be 'so unreasonably high or low as to be detrimental to the commerce of the United States' (46 U.S.C. § 817), the FMC does not possess authority to set rates in foreign commerce." H.R. Rep. No. 53 (Part II), 98th Cong., 2d Sess. 3 (1983), *reprinted in*, 1984 U.S. Code Cong. & Ad. News 221, 222. The 1916 Act has been further substantially modified by the Shipping Act of 1984, Pub. L. 98-237, 98 Stat. 67, *codified at* 46 U.S.C. app. § 1701 *et seq.* (Supp. III 1985). More specifically, the 1984 Act repealed § 817(b)(5), which is the substantive section of the 1916 Act at issue here. *See* Pub. L. 98-237, § 20, 98 Stat. 88. Thus, the FMC currently lacks authority to regulate *ad valorem* rates in international commerce.[3] As a consequence, the certainty that a court's consideration of the reasonableness of this *ad valorem* rate is not a rude shouldering ahead of the administrative body rests on the trial absence of any past administrative law respecting such rates and the unlikelihood of any arising in the future.

A second factor is whether the agency's expertise should first be brought to bear on the matter. *See, e.g., Western Pacific Railroad*, 352 U.S. at 64. Yet here the FMC's experience is

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[3]Despite the current inability of the agency to hear this sort of complaint, the primary jurisdiction question still must be resolved because the 1984 Act contains a savings provisions that applies to this action. *See* Pub. L. 98-237, § 20(e)(2)(B), 98 Stat. 90, *codified at* 46 U.S.C. app. § 1719(e)(2)(B) (Supp. III 1985).

not needed to determine if Nedlloyd's *ad valorem* rate denied GE a fair opportunity to declare value. The administrative agency's specialization would not offer much assistance in resolving that issue because its expertise is directed to a wholly different question: whether the *ad valorem* rate is "so unreasonably high or low as to be detrimental to the commerce of the United States." 46 U.S.C. § 817(b)(5), *repealed by* the Shipping Act of 1984, Pub. L. No. 98-237, § 20(a), 98 Stat. 67, 88. The resolution of that question is clearly best left in the first instance to the administrative agency, which is better equipped to engage in the wide-ranging factual analysis necessary to resolve it. Quite distinct is the instant legal issue, that is, whether Nedlloyd's rate is set so unreasonably high that courts should refuse to give effect to its contractual limitation of liability specified in its bill of lading. *See Adams Express Co.* v. *Croninger*, 226 U.S. 491, 509 (1913); *Shippers National Freight Claim Council, Inc.* v. *Interstate Commerce Comm'n*, 712 F.2d 740, 747 (2d Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984). As such, the issue involves the application of common law principles, *Adams Express*, 226 U.S. at 509-10; *First Pennsylvania Bank*, 731 F.2d at 1116, more competently decided in a judicial forum. *See Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 305 (1976); *Board of Education* v. *Harris*, 622 F.2d at 607.

Finally, courts consider whether Congress has given an agency power to immunize a person or organization from common law liability. *See Nader*, 426 U.S. at 303. Here, of course, the relevant basis for liability would be negligence. The Shipping Act of 1916 did not grant the FMC power to immunize carriers from liability for negligence. The only immunization that the FMC could—and still can—confer relates to the antitrust implications of carriers' agreements or action. *See* 46 U.S.C. § 814 (1982), *amended by* 46 U.S.C. App. App. § 814 (Supp. III 1985); *Square D.*, 760 F.2d at 1361-62. Because GE has

not challenged the *ad valorem* rate as violating antitrust prohibitions, there can be no usurpation of the FMC's functions.

Because those factors that bring the doctrine of primary jurisdiction into play are absent, there is no reason to adopt Nedlloyd's suggestion that the issue of the reasonableness of GE's *ad valorem* charge be referred to the FMC.

II *Fair Opportunity*

Next, in order to decide whether Nedlloyd denied GF a fair opportunity to declare value we examine the applicable common law principles. A carrier must provide a shipper with a "fair opportunity" to declare excess value. Only by granting shippers a fair opportunity to chose between paying a greater or lesser charge to obtain corresponding more or less protection for its goods may a carrier limit its liability to an amount less than the loss actually sustained. *See New York, New Haven & Hartford Railroad Co.* v. *Nothnagle*, 346 U.S. 128, 135 (1953). Absent fair opportunity, a carrier loses the benefit of any limitation of liability to which it otherwise might be entitled. *See, e.g., Komatsu Ltd.* v. *States Steamship Co.*, 674 F.2d 806 (9th Cir. 1982).

Fair opportunity, as developed in decisional law, comprises several different elements, two of which are present in this case. The first concerns whether the carrier has given adequate notice of the limitation of its liability to the shipper, thereby affording the shipper means of avoiding such limitation. The adequacy of notice in Nedlloyd's bill of lading will be discussed in part III. The means of avoiding the carrier's limitation of liability is, of course, for the shipper to declare the value of its goods. Once a shipper exercises this right, it must then pay an *ad valorem* charge.

The second element of the fair opportunity inquiry focuses on the *ad valorem* charge itself. As articulated in the leading case on this subject, a carrier must offer the shipper an *ad valorem* charge that is reasonable. *See Hart* v. *Pennsylvania Railroad Co.*, 112 U.S. 331, 341-42 (1884). *Hart* teaches that the reasonableness of the *ad valorem* rate is measured by the amount of risk assumed, i.e., the declared value of the goods. *See id.* at 340. "The principle is that the charge should bear some reasonable relationship to the responsibility, and that the care to be exercised shall be in some degree measured by the bulk, weight, character and value of the property carried." *Adams Express* 226 U.S. at 510. Because the only factor of those enumerated that is different when a shipper makes a declartion is the value of the cargo, *Adams Express* states that the risk assumed by the carrier is measured by the declared value. We consider therefore the reasonableness of Nedlloyd's *ad valorem* rate.

As noted earlier, GE's attempt to avoid COGSA's $500 limitation consists principally of an attack on the reasonableness of Nedlloyd's *ad valorem* 10% rate on total declared value. Our research disclosed no cases in which an *ad valorem* rate has been indicted as constituting a prohibited means by which a carrier attempted to limit its liability. GE's argument is unique in this respect. In fact, there are a number of cases where *ad valorem* rates greater than Nedlloyd's apparently did not raise any eyebrows. *See, e.g., Missouri Pacific Railway Co.* v. *Harper Brothers*, 201 F. 671, 672 (7th Cir. 1912) (25% *ad valorem* rate); *Latta* v. *Chicago, St. Paul, Minneapolis & Omaha Railway Co.*, 172 F. 850, 852 (8th Cir. 1909), *rev'd on other grounds*, 226 U.S. 519 (1913) (25% *ad valorem* rate for the first $800 of declared value); *Missouri, K. & T. Railway Co. of Texas* v. *Patrick*, 144 F. 632, 632-33 (8th Cir. 1906) (regular freight rate reduced by 33% if shipper accepted limitation of liability).

Beyond the paucity of precedent, GE's argument sinks under

an even heavier weight. It cannot now challenge the *ad valorem* rate as being unreasonable because the record shows that GE never even inquired about making such a declaration, much less took steps towards actually declaring the value of its cargo. Thus, we conclude that GE is estopped from arguing—after its cargo was damaged—that an excessive *ad valorem* charge prevented it from declaring their value initially. *See First Pennsylvania*, 731 F.2d at 1122. As an experienced shipper, GE obviously knew it could declare a higher value. The lack of evidence with respect to GE's investigation of Nedlloyd's *ad valorem* charge strongly suggests that "[t]hey made a business judgment . . . not to explore the possibility of obtaining greater protection . . . at [a] higher rate." *Id.* Hence, the alleged excessiveness of Nedlloyd's *ad valorem* charge played no part in denying GE a fair opportunity to declare value. Instead, it was GE's own cost-benefit analysis that prevented it from taking such a step. Moreover, the cost analysis was made long before this particular action was contemplated, as attested to by GE's Export Ocean Transportation Manager's statement that he had never known GE to declare the value of its ocean cargo.

III *The Adequacy of Notice*

The final issue is whether Nedlloyd's bill of lading provided GE with adequate notice of the $500 limitation and the means of avoiding that limitation. Familiar principles guide this inquiry. The carrier bears the initial burden of proving fair opportunity. *Cincinnati Milacron, Ltd.* v. *M/V American Legend*, 784 F.2d 1161, 1163 (4th Cir.), *rev'd on other grounds*, 804 F.2d 837 (1986) (en banc). *Prima facie* evidence of that opportunity is established when it can be gleaned from the language contained in the bill of lading. *Cincinnati Milacron*, 784 F.2d at 163; *Petition of Isbrandtsen Co.*, 201 F.2d 281, 285 (2d Cir. 1953). If the carrier succeeds in demonstrating fair oppor-

tunity, the burden of proof shifts to the shipper to demonstrate that a fair opportunity did not in fact exist. *Id.*

We agree with the district court that Nedlloyd's bill of lading furnished GE with adequate notice and, hence, fair opportunity. As we held in *Binladen BSB Landscaping* v. *M.V. Nedlloyd Rotterdam*, 759 F.2d 1006, 1017 n.12 (2d Cir.), *cert. denied*, 106 S. Ct. 229 (1985), the language on the back of the Nedlloyd document incorporating COGSA's provisions and the space for declaring excess value on the front are sufficient notice of the limitation of liability and the means of avoiding it. GE's attempts to distinguish *Binladen* are unconvincing. The other claims raised on this appeal regarding Nedlloyd's bill of lading are without merit and require no further discussion.

CONCLUSION

Accordingly, the judgment of the district court is affirmed.

APPENDIX A

Opinion of Court of Appeals for the Second Circuit (West Publishing Company version)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 90 — August Term, 1986
(Argued October 8, 1986 Decided May 6, 1987)
Docket No. 86-7376

GENERAL ELECTRIC COMPANY,
Plaintiff-Appellant,

—v.—

MV NEDLLOYD, her engines, boilers,
NEDLLOYD LIJNEN B.V. (NEDLLOYD LINES),
Defendant-Appellees.

Before: LUMBARD, CARDAMONE and PIERCE,
Circuit Judges

Shipper brought action against carrier for damage to goods while aboard ship. The United States District Court for the Southern District of New York, Kevin Thomas Duffy, J., held carrier liable for damage to shipper's cargo, but limited recovery pursuant to provisions of bill of lading. Shipper appealed. The Court of Appeals, Cardamone, Circuit Judge, held that: (1) Federal Maritime Commission did not have primary jurisdiction over shipper's challenge of carrier's *ad valorem* rate; (2) shipper was estopped from arguing after its cargo was damaged that carrier's *ad valorem* 10% rate on total declared value prevented it from declaring cargo's value initially; and (3) bill of lading which incorporated COGSA's provisions and provided space for declaring excess value gave shipper's sufficient notice of limitation of liability and means of avoiding it.

Affirmed.

JOHN E. CONE, JR., New York, New York (Douglas A. Jacobsen, William R. Connor III, Bigham, Englar, Jones & Houston, of Counsel), *for Plaintiff-Appellant.*

J. SCOT PROVAN, New York, New York (Arthur E. Hoffmann, Jr., Kirlin, Campbell & Keating, of Counsel), *for Defendant-Appellee.*

CARDAMONE, *Circuit Judge*:

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lines, Inc., 731 F.2d 1113, 1116 (3rd Cir. 1984). The obligation to use due care is now imposed by statute, 46 U.S.C. §§ 1303(1) and (2) (1982), so that a carrier cannot by contract exculpate itself from this duty in providing a seaworthy vessel or in handling or shipping cargo.

In 1921 the Hague Rules adopted this view of a carrier's liability. These Rules—as amended by the Brussels Convention of 1924—were adhered to by the United States in 1936. In that same year Congress passed the Carriage of Goods by Sea Act (COGSA) ch. 229, 49 Stat. 1207 (codified at 46 U.S.C. §§ 1300-15 (1982), which adopted the Hague Rules. COGSA allows freedom of contract outside its provisions only if a carrier's liability is increased, not reduced. Gilmore & Black, *supra*, § 3-25 at 145. Consequently, a carrier's liability for cargo damage today has gone from one extreme to the other—from absolute liability to liability predicated only on a showing of fault.

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The *NEDLLOYD ROUEN* sailed from New York on February 18, 1983 and a day or two later encountered gale winds and stormy winter weather in the North Atlantic. When the *NEDLLOYD ROUEN* began rolling and heaving, GE's two cabs broke free from their lashings, fell onto the deck from the flatbed trailer, and were damaged. Following unsuccessful repair attempts, the damaged equipment was later replaced by two new units.

C. *Proceedings Below*

A year later GE sued Nedlloyd for one million dollars. Nedlloyd answered and moved for partial summary judgment claiming that COGSA's $500 limitation applied. GE responded that Nedlloyd's *ad valorem* rate was unreasonably high compared to Nedlloyd's cost of obtaining additional insurance sufficient to cover the greater risk to Nedlloyd had GE declared excess value. GE also argued that the bill of lading should have mentioned explicitly COGSA's $500 limitation, rather than merely incorporating it by reference. Finally, GE urged that the print on the back of the bill of lading—where the "U.S.A. Clause" was located—was illegible because it was too small to read.

The district court granted Nedlloyd's motion and summarily rejected GE's latter two contentions. It found that Nedlloyd bill of lading "clearly contained" a space for declaring excess value and provided sufficient notice that COGSA's limitation applied. It further held that the issue of the print size was irrelevant to the question of whether GE received adequate notice of its right to declare excess value.

The district court also rejected GE's first contention that Nedlloyd's rate was unconscionably high for two reasons. First, it was unconvinced that the *ad valorem* rate prevented GE from declaring excess value. Citing Diplock, *Conventions and Morals —Limitation Clauses in International Maritime Conventions,* 1 Journal of Maritime Law and Commerce, 525, 529-30 (1970) (Diplock), the court stated that if it were actually more economical for carriers rather than shippers to insure the excess value, then *ad valorem* rates would reflect this fact and, as a consequence, be lower than they are. Thus, because Nedlloyd's *ad valorem* rate exceeded what it cost GE to insure its cargo, it was not the *ad valorem* rate but the economics of insuring the cargo that prevented GE from declaring excess value. Judge Duffy additionally found that GE had no intention of declaring an excess value for its cargo. For this finding, the district court relied on GE's Export Ocean Transportation Manager's statement that in 43 years of working in the transportation department he had never known GE to declare excess value.

Following the district court's disposition of its motion, Nedlloyd consented to an entry of judgment against it for $28,500 plus interest.[1] GE appeals challenging the rulings that Nedlloyd's *ad valorem* rate was reasonable and that its bill of lading provided adequate notice of the COGSA limitation. Before discussing these issues, we consider the threshold question of jurisdiction.

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[1]One of the two items was found by the district court to be a single "package" subject to the $500 limitation. The other was charged on the basis of 40 cubic foot units of which it had 56 units x $500 or $28,000. Appellant takes no issue with this computation of $28,000 if the COGSA limitation applies.

DISCUSSION

I THE JURISDICTIONAL ISSUE

A. *Primary Jurisdiction Generally*

Nedlloyd argues that GE's challenge to its *ad valorem* rate essentially involves an attack on its reasonableness. As such, Nedlloyd continues, under the doctrine of primary jurisdiction the Federal Maritime Commission (FMC) is the proper body to pass on that complaint first.[2]

Primary jurisdiction is a doctrine that is used to determine whether a given issue should be passed on first in a judicial or administrative forum. In other words, it fixes priority for passing on a given issue. While administrative expertise is a factor that a court considers in deciding whether it should take initial jurisdiction, *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, 64 (1956), the principal reason why such a doctrine exists is to encourage a court and agency to act in coordination with one other. *See* 3 K. Davis, *Administrative Law*, § 19.01 at 5 (1958). Thus, when Congress has entrusted the regulation of certain subject matter under a statute to an

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[2]Nedlloyd's request that the doctrine of primary jurisdiction be invoked is inconsistent with its argument that the judgment appealed from be affirmed, since the district court ruled in Nedlloyd's favor on the reasonableness of the *ad valorem* rate. In fact, the district court's conclusion that the rate was reasonable was central to its holding that GE had been afforded a fair opportunity to declare excess value. If, as Nedlloyd suggests, deference to the FMC is the order of the day, then the court below also should have deferred to that administrative body, and Nedlloyd should be urging not affirmance, but reversal. Nonetheless, for the reasons discussed, we find no basis to reverse.

administrative agency, it is often counterproductive for a court to act upon that subject matter without the benefit of knowing what the agency has to offer. Beyond that, courts and administrative agencies should not act at cross purposes lest they become "wholly independent and unrelated instrumentalities of justice, each acting . . . without regard to the appropriate function of the other." *United States* v. *Morgan*, 307 U.S. 183, 191 (1939).

There is no fixed formula for deciding when the doctrine applies. *Western Pacific Railroad*, 352 U.S. at 64. Analysis is on a case-by-case basis. But courts ordinarily do not defer when the issue involved is purely a legal question, one not involving agency expertise or experience. *Board of Education* v. *Harris*, 622 F.2d 599, 607 (2d Cir. 1979), *cert. denied*, 449 U.S. 1124 (1981). In determining whether to defer, courts should determine "whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *Western Pacific Railroad*, 352 U.S. at 64.

B. *Application of Primary Jurisdiction Doctrine*

Thus, we examine the factors upon which the existence of the doctrine rests to determine whether deferral is appropriate. Before applying these factors, it should be noted that the posture of the instant case distinguishes it from the one upon which Nedlloyd principally relies in urging that the doctrine of primary jurisdiction be applied, *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474 (1932). In *Cunard*, the Supreme Court affirmed the dismissal of the petitioner's request for injunctive relief. The Court held that the petitioner's challenge to a group of carriers' freight rates was within the FMC's primary jurisdiction. *See id.* at 481-85. There, peti-

tioner charged that respondent's rates interfered with commerce by operating to "exclude [petitioner] entirely from the carrying trade between the United States and Great Britain." *Id.* at 480. The FMC is considered to have the expertise to answer this question, as its statutory mandate directs it to examine whether rates are "so unreasonably high or low [as] to be detrimental to the commerce of the United States." 46 U.S.C. § 817(b), *repealed by* The Shipping Act of 1984, Pub. L. No. 98-237, § 20(a), 98 Stat. 67, 88. In contrast, GE challenges Nedlloyd's rates as effectively eliminating its right to declare a higher value for its cargo, a question which, as we shall develop more fully, does not similarly fall within the bounds of the FMC's area of expertise. Consequently, *Cunard* does not require court deferral of GE's challenge, but it does point up the need to determine the applicability of the doctrine of primary jurisdiction.

One factor already noted is the need for uniformity and consistency in the regulation of business entrusted to a particular agency. *See Far East Conference* v. *United States*, 342 U.S. 570, 574 (1952). Since actions challenging an individual carrier's *ad valorem* rates are like rare birds—seldom, if ever, seen—there is little danger that the uniformity or consistency of the regulatory scheme will be set at odds because a court first considers the issue. In fact, neither party has cited a single action challenging an individual carrier's *ad valorem* rates either before the FMC or the federal courts. Nor has research uncovered any. This lack of case law is not surprising in view of the limited power given the FMC by the Shipping Act of 1916. As we observed in another context: "[T]he Shipping Act [of 1916] is a very limited regulatory scheme. It imposes only a few general duties, and the central purpose of the statute was to provide for industry self-regulation. . . ." *Square D. Co.* v. *Niagara Frontier Tariff Bureau*, 760 F.2d 1347, 1362 (2d Cir. 1985), *aff'd*, 106 S. Ct. 1922 (1986).

Moreover, the legislative history of the Shipping Act of 1984 again reflects the limited role that the FMC has played in regulating this particular aspect of the maritime industry. In discussing § 817(b)(5)—the substantive section of the 1916 Act implicated by a challenge to the reasonableness of an *ad valorem* rate—a House Report stated: "[T]he FMC can investigate specific violations of the Shipping Act; however, except for a seldom exercised power to disapprove rates found to be 'so unreasonably high or low as to be detrimental to the commerce of the United States' (46 U.S.C. § 817), the FMC does not possess authority to set rates in foreign commerce." H.R. Rep. No. 53 (Part II), 98th Cong., 2d Sess. 3 (1983), *reprinted in*, 1984 U.S. Code Cong. & Ad. News 221, 222. The 1916 Act has been further substantially modified by the Shipping Act of 1984, Pub. L. 98-237, 98 Stat. 67, *codified at* 46 U.S.C. app. § 1701 *et seq.* (Supp. III 1985). More specifically, the 1984 Act repealed § 817(b)(5), which is the substantive section of the 1916 Act at issue here. *See* Pub. L. 98-237, § 20, 98 Stat. 88. Thus, the FMC currently lacks authority to regulate *ad valorem* rates in international commerce.[3] As a consequence, the certainty that a court's consideration of the reasonableness of this *ad valorem* rate is not a rude shouldering ahead of the administrative body rests on the trial absence of any past administrative law respecting such rates and the unlikelihood of any arising in the future.

A second factor is whether the agency's expertise should first be brought to bear on the matter. *See, e.g., Western Pacific Railroad*, 352 U.S. at 64. Yet here the FMC's experience is

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[3]Despite the current inability of the agency to hear this sort of complaint, the primary jurisdiction question still must be resolved because the 1984 Act contains a savings provisions that applies to this action. *See* Pub. L. 98-237, § 20(e)(2)(B), 98 Stat. 90, *codified at* 46 U.S.C. app. § 1719(e)(2)(B) (Supp. III 1985).

not needed to determine if Nedlloyd's *ad valorem* rate denied GE a fair opportunity to declare value. The administrative agency's specialization would not offer much assistance in resolving that issue because its expertise is directed to a wholly different question: whether the *ad valorem* rate is "so unreasonably high or low as to be detrimental to the commerce of the United States." 46 U.S.C. § 817(b)(5), *repealed by* the Shipping Act of 1984, Pub. L. No. 98-237, § 20(a), 98 Stat. 67, 88. The resolution of that question is clearly best left in the first instance to the administrative agency, which is better equipped to engage in the wide-ranging factual analysis necessary to resolve it. Quite distinct is the instant legal issue, that is, whether Nedlloyd's rate is set so unreasonably high that courts should refuse to give effect to its contractual limitation of liability specified in its bill of lading. *See Adams Express Co.* v. *Croninger*, 226 U.S. 491, 509 (1913); *Shippers National Freight Claim Council, Inc.* v. *Interstate Commerce Comm'n*, 712 F.2d 740, 747 (2d Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984). As such, the issue involves the application of common law principles, *Adams Express*, 226 U.S. at 509-10; *First Pennsylvania Bank*, 731 F.2d at 1116, more competently decided in a judicial forum. *See Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 305 (1976); *Board of Education* v. *Harris*, 622 F.2d at 607.

Finally, courts consider whether Congress has given an agency power to immunize a person or organization from common law liability. *See Nader*, 426 U.S. at 303. Here, of course, the relevant basis for liability would be negligence. The Shipping Act of 1916 did not grant the FMC power to immunize carriers from liability for negligence. The only immunization that the FMC could—and still can—confer relates to the antitrust implications of carriers' agreements or action. *See* 46 U.S.C. § 814 (1982), *amended by* 46 U.S.C. App. App. § 814 (Supp. III 1985); *Square D.*, 760 F.2d at 1361-62. Because GE has

not challenged the *ad valorem* rate as violating antitrust prohibitions, there can be no usurpation of the FMC's functions.

Because those factors that bring the doctrine of primary jurisdiction into play are absent, there is no reason to adopt Nedlloyd's suggestion that the issue of the reasonableness of GE's *ad valorem* charge be referred to the FMC.

II *Fair Opportunity*

Next, in order to decide whether Nedlloyd denied GF a fair opportunity to declare value we examine the applicable common law principles. A carrier must provide a shipper with a "fair opportunity" to declare excess value. Only by granting shippers a fair opportunity to chose between paying a greater or lesser charge to obtain corresponding more or less protection for its goods may a carrier limit its liability to an amount less than the loss actually sustained. *See New York, New Haven & Hartford Railroad Co.* v. *Nothnagle*, 346 U.S. 128, 135 (1953). Absent fair opportunity, a carrier loses the benefit of any limitation of liability to which it otherwise might be entitled. *See, e.g., Komatsu Ltd.* v. *States Steamship Co.*, 674 F.2d 806 (9th Cir. 1982).

Fair opportunity, as developed in decisional law, comprises several different elements, two of which are present in this case. The first concerns whether the carrier has given adequate notice of the limitation of its liability to the shipper, thereby affording the shipper means of avoiding such limitation. The adequacy of notice in Nedlloyd's bill of lading will be discussed in part III. The means of avoiding the carrier's limitation of liability is, of course, for the shipper to declare the value of its goods. Once a shipper exercises this right, it must then pay an *ad valorem* charge.

The second element of the fair opportunity inquiry focuses on the *ad valorem* charge itself. As articulated in the leading case on this subject, a carrier must offer the shipper an *ad valorem*

charge that is reasonable. *See Hart* v. *Pennsylvania Railroad Co.*, 112 U.S. 331, 341-42 (1884). *Hart* teaches that the reasonableness of the *ad valorem* rate is measured by the amount of risk assumed, i.e., the declared value of the goods. *See id.* at 340. "The principle is that the charge should bear some reasonable relationship to the responsibility, and that the care to be exercised shall be in some degree measured by the bulk, weight, character and value of the property carried." *Adams Express* 226 U.S. at 510. Because the only factor of those enumerated that is different when a shipper makes a declartion is the value of the cargo, *Adams Express* states that the risk assumed by the carrier is measured by the declared value.

As noted earlier, GE's attempt to avoid COGSA's $500 limitation consists principally of an attack on the reasonableness of Nedlloyd's *ad valorem* 10% rate on total declared value. Our research disclosed no cases in which an *ad valorem* rate has been indicted as constituting a prohibited means by which a carrier attempted to limit its liability. GE's argument is unique in this respect.

Regardless of the novelty of GE's claim, it cannot now challenge the *ad valorem* rate as being unreasonable because the record shows that GE never even inquired about making such a declaration, much less took steps towards actually declaring the value of its cargo. Thus, we conclude that GE is estopped from arguing—after its cargo was damaged—that an excessive *ad valorem* charge prevented it from declaring their value initially. *See First Pennsylvania*, 731 F.2d at 1122. As an experienced shipper, GE obviously knew it could declare a higher value. The lack of evidence with respect to GE's investigation of Nedlloyd's *ad valorem* charge strongly suggests that "[t]hey made a business judgment . . . not to explore the possibility of obtaining greater protection . . . at [a] higher rate." *Id.* Hence, the alleged excessiveness of Nedlloyd's *ad valorem* charge played no part in denying GE a fair opportunity to declare value. Instead, it was GE's own cost-benefit analysis

that prevented it from taking such a step. Moreover, the cost analysis was made long before this particular action was contemplated, as attested to by GE's Export Ocean Transportation Manager's statement that he had never known GE to declare the value of its ocean cargo.

III *The Adequacy of Notice*

The final issue is whether Nedlloyd's bill of lading provided GE with adequate notice of the $500 limitation and the means of avoiding that limitation. Familiar principles guide this inquiry. The carrier bears the initial burden of proving fair opportunity. *Cincinnati Milacron, Ltd.* v. *M/V American Legend*, 784 F.2d 1161, 1163 (4th Cir.), *rev'd on other grounds*, 804 F.2d 837 (1986) (en banc). *Prima facie* evidence of that opportunity is established when it can be gleaned from the language contained in the bill of lading. *Cincinnati Milacron*, 784 F.2d at 163; *Petition of Isbrandtsen Co.*, 201 F.2d 281, 285 (2d Cir. 1953). If the carrier succeeds in demonstrating fair opportunity, the burden of proof shifts to the shipper to demonstrate that a fair opportunity did not in fact exist. *Id.*

We agree with the district court that Nedlloyd's bill of lading furnished GE with adequate notice and, hence, fair opportunity. As we held in *Binladen BSB Landscaping* v. *M.V. Nedlloyd Rotterdam*, 759 F.2d 1006, 1017 n.12 (2d Cir.), *cert. denied*, 106 S. Ct. 229 (1985), the language on the back of the Nedlloyd document incorporating COGSA's provisions and the space for declaring excess value on the front are sufficient notice of the limitation of liability and the means of avoiding it. GE's attempts to distinguish *Binladen* are unconvincing. The other claims raised on this appeal regarding Nedlloyd's bill of lading are without merit and require no further discussion.

CONCLUSION

Accordingly, the judgment of the district court is affirmed.

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 30th day of July, one thousand nine hundred and eighty-seven.

GENERAL ELECTRIC COMPANY,
Plaintiff-Appellant,

—v.—

MV NEDLLOYD, her engines, boilers, NEDLLOYD LIJNEN B.V. (NEDLLOYD LINES),
Defendant-Appellees.

A petition for rehearing containing a suggestion that the action be reheard *in banc* having been filed herein by counsel for the Appellant General Electric Company.

Upon consideration by the panel that heard the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing *in banc* has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
86-7376

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of May, one thousand nine hundred and eighty-seven.

Present: HON. J. EDWARD LUMBARD,
HON. RICHARD J. CARDAMONE,
HON. LAWRENCE W. PIERCE,
Circuit Judges.

GENERAL ELECTRIC COMPANY,
Plaintiff-Appellant,

—v.—

MV NEDLLOYD, her engines, boilers, NEDLLOYD LIJNEN B.V. (NEDLLOYD LINES),
Defendant-Appellees.

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York; and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Judgment of said District Court be and is hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

By:
By:
By:

ELAINE B. GOLDSMITH,
Clerk
By: EDWARD J. GUARDARO,
Deputy Clerk

APPENDIX B

Opinion of District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
84 Civ. 1113 (KTD)

GENERAL ELECTRIC COMPANY,

Plaintiff,

—against—

M.V. "NEDLLOYD ROUEN", her engines, boilers, etc.,

—and against—

NEDLLOYD LIJNEN B.V. (NEDLLOYD LINES),

Defendants.

MEMORANDUM AND ORDER

APPEARANCES:

BIGHAM ENGLAR JONES & HOUSTON
Attorneys for Plaintiff
14 Wall Street
New York, New York 10005

Of Counsel: JOHN B. CONE, JR., Esq.
HELEN M. BENZIE, Esq.
LAWRENCE B. BRENNAN, Esq.

KIRLIN, CAMPBELL & KEATING
Attorneys for Defendants
120 Broadway
New York, New York 10271

Of Counsel: WILLIAM XANTTOPOULOS, Esq.

Opinion of District Court

KEVIN THOMAS DUFFY, D.J.:

Plaintiff General Electric Company ("G.E.") commenced this action pursuant to the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. §1300, et seq., to recover for damage to part of its cargo intended for a power station being constructed by G.E. in Saudia Arabia. Defendant Nedlloyd Lijnen B.V. ("Nedlloyd Lines" or "Nedlloyd") moves pursuant to Fed. R. Civ. P. 56 for partial summary judgment limiting its liability to $500.00 per package or customary freight unit. *See* 46 U.S.C. §1304(5).

FACTS

On February 16, 1983, Nedlloyd issued a bill of lading to G.E. for the carriage of twenty-six items of cargo, including a generator Auxiliary Compartment (Case 101) and a Control Cab (Piece 214), from Portsmouth, Virginia to Yenbu, Saudi Arabia. Case 101 and Piece 214 were allegedly damaged en route to Saudi Arabia when, on the evening of February 19, 1984, the M.V. Nedlloyd Rouen encountered heavy weather, and both items slid form the flatbed on which they were stowed in deck 2 of the vessel. *See* Affidavit of William Xanttopoulos, Exh. M (deck log); Exh. H (stowage plan).

G.E. apparently had the two units repaired at a cost of approximately $59,933.28 and then sold the units to an affiliated company for $16,000.00. *See id.*, Exh. I (Deposition of Richard J. Condon). Thereafter, G.E. replaced the two units at a cost of $686,325.00. *See id.*, Exh. J (letter from Condon concerning insured value of machinery); Affidavit of John E. Cone, Jr., Exh. 8. In its action, G.E. seeks to recover the cost of replacing the units, the temporary repair costs less salvage, and other expenses such as survey costs.

DISCUSSION

COGSA applies by its own force to all bills of lading covering shipments of goods from the United States in foreign trade. 46 U.S.C. §1300; *S.M. Wolff Co.* v. *The Exiria,* 200 F. Supp. 809, 811 (S.D.N.Y. 1961). Plaintiff's cargo was transported from Portsmouth, Virginia under a bill of lading that contained a "U.S.A. Clause" incorporating COGSA in the contract of carriage. *See* Xanttopoulos Affidavit, Exh. A (bill of lading). Thus, COGSA clearly applies to the instant contract.

COGSA §4(5) provides:

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

46 U.S.C. §1304(5).

I.

Nedlloyd's bill of lading form contains a box (clause 6) on the front of the form labeled "Excess Valuation" and refers the reader to clause 7(1)b on the reverse side of the form. This box was left blank on the bills of lading covering this shipment. Thus,

pursuant to section 4(5) of COGSA, absent G.E.'s declaration of the value of its cargo, Nedlloyd's liability is limited to e[illegible] $500 per package or per customary freight unit. Had G.E. chosen to declare the value of its cargo, according to rule 12 of Nedlloyd's Tariff filed with the Federal Maritime Commission ("FMC"), it would have had to pay an additional ten percent of the total declared valuation over freight.

G.E. does not dispute the fact that it did not declare the value of the two units. Instead, G.E. advances three primary arguments which challenge Nedlloyd's bill of lading form and the ten percent surcharge policy as unconscionable. First, plaintiff argues that Nedlloyd should not be afforded the benefit of any limitation of liability since the bill of lading merely incorporated COGSA's limitation provision without explicitly setting forth the provision and that the other clauses on the back of the form created ambiguities that should be resolved against Nedlloyd. Second, plaintiff submits exhibits to show that the size of the print used on the back of the bill of lading form was inadequate and that the notice to plaintiff of the option of declaring the value of its cargo was insufficient. I conclude that these first two arguments are meritless.

The burden is on the shipper to show that the "opportunity for choice of evaluations and rates did not in fact exist." *See Wuerttembergische & Badische Versicherungs-Aktiengesellschaft* v. *M/V Stuttgart Express*, 711 F.2d 621, 622 (5th Cir. 1983) (*citing Petition of Isbrandtsen Co.*, 201 F.2d 281, 285 (2d Cir. 1953)). The Nedlloyd form clearly contained a space entitled "excess valuation" within which G.E. could have inserted a declaration of value. The combination of the form's inclusion of such a space, the incorporation of COGSA into the contract of carriage, and the filing of the tariff with the FMC, supports the conclusion that G.E. had adequate notice of the $500 limitation. *See Wuerttembergische*, 711 F.2d at 622 (published tariff gave

shipper notice of valuations satisfying requirement that the shipper be given an opportunity to avoid the limitation).

Furthermore, G.E.'s assertion that the print on the form was too small to provide adequate notice and that, in fact, none of its employees knew that an option to declare the value of the units existed, does not exonerate G.E. from the operation of COGSA's limitation provision. The fact that G.E.'s agents did not read the back of the form or know what COGSA provided is irrelevant to the conclusion that G.E. was put on notice of its right to declare the value of its cargo.

G.E.'s third argument is that, as a practical matter, it was not given any choice to declare value because the cost of doing so is so exorbitant that no shipper ever would or has declared value. G.E. maintains that it would have opted to declare the cargo's true value if the charge by Nedlloyd had been reasonable. Both the policy argument and the factual assertions advanced by G.E. are specious.

The policy argument has been addressed by Lord Diplock of the House of Lords who notes that "it is sometimes asserted, with moral indignation, that carriers have robbed shippers of their option by insisting upon excessive freight rates if their liability is to exceed the ordinary limitation figure." Diplock, "Conventions and Moral Limitation Clauses in International Maritime Conventions," 1 *Journal of Maritime Law and Commerce*, 529-530 (1970). Diplock points out that, if indeed it was more economical for the carrier to insure against the excess liability than for the cargo owner to cover it with his own cargo insurer, the carrier would quote rates which would reflect the lower cost. "There is no reason why he should allow the higher premium to go into the pocket of the cargo insurer.' *Id.* Furthermore, it appears from G.E.'s submissions that there was competition for this shipping route. If Nedlloyd's rates were excessive, G.E. could

have attempted to negotiate a lower rate or hire one of Nedlloyd's competitors.

Regarding G.E.'s factual assertion, I note that there is no indication that G.E. had any desire whatsoever to declare a higher value and obtain added insurance from the carrier. Indeed, the evidence is to the contrary. An employee for G.E., Anthony A. Vinci, testified that, in his forty-three years in the transportation department of the company, G.E. never once declared the value of its cargo to avoid the COGSA limitation. *See* Xanttopoulos Affidavit, Ehx. D at 127-128. G.E. has presented no evidence to indicate that in this case it intended to abandon a policy it had pursued for at least the past forty-three years. Finally, because the *ad valorem* clause is filed with the FMC, G.E. should address to that body its argument that the additional charge is unconscionable. For all of the above reasons, I conclude that Nedlloyd's bill of lading form is adequate, and its excess valuation charge policy is not unconscionable.

Thus, because plaintiff has not raised any material issue of fact, partial summary judgment is granted in favor of defendant. *See Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The movant, Nedlloyd, has sustained its burden of establishing that there is no material fact in dispute, and that it is entitled to judgment as a matter of law. *Id.* Accordingly, since plaintiff failed to declare the actual value of its cargo, defendant's liability is limited to either $500 per package or $500 per customary freight unit.

II.

The parties appear to agree, or at least G.E. does not dispute, that the amount of limitation, if any, for Piece 214 would be $500 per customary freight unit or per 40 cubic feet totalling

$28,000.00.[1] There is no such agreement, however, with respect to Case 101. I conclude, for the following reasons, that Case 101 constitutes a package within the meaning of Section 4(5) of COGSA. Therefore, defendant's liability, if any, for the damage to this item would be limited to $500.

COGSA does not define "packages;" thus, courts have employed a "straight-forward contract analysis" in determining whether a particular piece of cargo is a "package." *See Allied International American Eagle Trading Corp.* v. *The S.S. Yang Ming*, 672 F.2d 1055, 1057 (2d Cir. 1982). Case 101 is de-

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[1]Freight on this cargo was paid by G.E. to Nedlloyd on the basis of "measurement tons." Defendants' Exh. B (Deposition of Anthony J. Vinci) at 64. The "measurement ton" basis of freight permits the carrier to charge freight based upon the number of tons or upon the number of 40 cubic foot units, whichever is greater. In this case, the cargo was more volume, than weight, intensive; hence, the freight is based on measurement. Piece 214 measured 56 units. Courts have held that customary freight unit refers to the unit of the cargo "customarily used as the basis for the calculation of the freight rate to be charged." *General Motors Corp.* v. *Moore-McCormack Lines, Inc.*, 451 F.2d 24, 25 (2d Cir. 1971) (citing *The Bill*, 55 F. Supp. 780, 783 (D. Md. 1944)).

In computing the customary freight unit in a particular case, a court must look to the unit which the carrier actually used to compute the freight charge for the shipment. *Croft & Scully Co.* v. *M/V Skulptor Vuchetich*, 664 F.2d 1277, 1282 (5th Cir. 1982) (quoting *Caterpillar Americas Co.* v. *S.S. Sea Roads*, 231 F. Supp. 647, 649 (S.D. Fla. 1964), *aff'd*, 364 F.2d 829 (5th Cir. 1966)). For example, in a case in which the freight charged was calculated for each locomotive, the court held that a locomotive was the customary freight unit. *See India Supply Mission* v. *S.S. Overseas Joyce*, 346 F. Supp. 536 (S.D.N.Y. 1965). Where the freight charged was for the shipment of power plants, an entire power plant was ruled to be the customary freight unit. *See General Motors Corp.*, 451 F.2d at 26. In the present case, the carrier calculated the freight charge based on 40 cubic foot units. Piece 214 consisted of 56 40-cubic-foot freight units. Hence, Nedlloyd's liability for this piece totals $28,000 (56 units x $500).

scribed on the bill of lading as "CS Control Cab Contains 12 Batteries" and under the column entitled "no. of pkgs" it is listed as 1 package. The packing list and commercial invoice refer to the control cab as "1 case." *See id.*, Exhs. E and F.

Furthermore, the appearance of the unit and the manner in which it was prepared for shipment lends support to a finding that the parties intended Case 101 to be a package within the meaning of COGSA. *See Solar Turbines, Inc.* v. *M/V Alva Maersk*, 584 F. Supp. 32, 33-34 (S.D.N.Y. 1983) (air exchange unit which was partially covered found to be a package based on intention of contracting parties and the physical description of the unit).

Although courts have held that completely uncovered or uncrated items are not necessarily packages, *see, e.g., Petition of Isbrandtsen Co.*, 201 F.2d 281, 286 (2d Cir. 1953), items which are only partially covered have been the subject of many disputes, *see, e.g., Aluminios Pozuelo Ltd.* v. *S.S. Navigator*, 407 F.2d 152, 155 (2d Cir. 1968). Case 101, the control cab, was enclosed in steel on a weatherproof steel base. The base was part of the unit. Xanttopoulos Affidavit, Exh. G (Deposition of Charles M. Vandergrift). In preparation for shipping, plywood was bolted over the air conditioning holes in the cab and caulking was placed around it. *Id.* The unit was blocked with timber from the inside. *Id.* Unlike the generator in *Solar Turbines, Inc.* v. *S.S. Al Shidadiah*, in which I found the enclosure was "not preparation for shipping, but rather primarily, if not solely, part of the product itself," *see* 575 F. Supp. 939, 941 (S.D.N.Y. 1983), here, "some packaging preparation for transportation has been made which facilitates handling but which does not necessarily conceal or completely enclose the goods." *Alumninios*, 407 F.2d at 155. Thus, the fact that G.E.'s control cab was braced and blocked with approximately 300 pounds of material that served no purpose other than to fortify the unit for shipping

lends substantial support to the conclusion that Case 101 was a package. Finally, batteries and equipment were stored in Case 101 during transport. This lends additional support to the conclusion that Case 101 was a package, and not merely a self-contained unit. *See* Xanttopoulos Affidavit, Exh. G. at 10.

Accordingly, defendants' motion for partial summary judgment is granted and its liability, if any, shall be limited to $28,000 for Piece 214 and $500 for Case 101.

SO ORDERED.

DATED: New York, New York
February 28, 1985

KEVIN THOMAS DUFFY, U.S.D.J.

STATUTE

Carriage of Goods by Sea Act

§1301. Definitions

When used in this chapter—

(a) The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

(b) The term "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

(c) the term "goods" includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

(d) The term "ship" means any vessel used for the carriage of goods by sea.

(e) The term "carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

Apr. 16, 1936, c. 229, §1, 49 Stat. 1208.

§1302. Duties and rights of carrier

Subject to the provisions of section 1306 of this title, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities

and liabilities and entitled to the rights and immunities set forth in sections 1303 and 1304 of this title.

April 16, 1936, c. 229, §2, 49 Stat. 1208.

§1303. Responsibilities and liabilities of carrier and ship Seaworthiness

(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carrier, fit and safe for their reception, carriage, and preservation.

Cargo

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

Contents of bill

(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quan-

tity or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods: *Provided,* That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

Bill as prima facie evidence

(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3)(a), (b) and (c), of this section: *Provided,* That nothing in this chapter shall be construed as repealing or limiting the application of any part of sections 81 to 124 of Title 49.

Guaranty of statements

(5) The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

Notice of loss or damage; limitation of actions

(6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be

prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: *Provided*, That is a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

"Shipped" bill of lading

(7) After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading: *Provided*, That if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been

shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a "shipped" bill of lading.

Limitation of liability for negligence

(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

Apr. 16, 1936, c. 229, §3, 49 Stat. 1208.

§1304. Rights and immunities of carrier and ship
Unseaworthiness

(1) Neither the carrier nor the ship shall be liable for loss or damage, arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

Uncontrollable causes of loss

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or

the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative

(j) Strike or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided,* That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

Freedom from negligence

(3) The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

Deviations

(4) Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided, however,* That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

Amount of liability; valuation of cargo

(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided,* That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

Inflammable explosive or dangerous cargo

(6) Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

Apr. 16, 1936, c. 229, §4, 49 Stat. 1210.

§1305. Surrender of rights; increase of liability; charter parties; general average

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under this chapter, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of this chapter shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party; they shall comply with the terms of this chapter. Nothing in this chapter shall be held to prevent the

insertion in a bill of lading of any lawful provision regarding general average.

Apr. 16, 1936, c. 229, §5, 49 Stat. 1211.

§1306. Special agreement as to particular goods

Notwithstanding the provisions of sections 1303 to 1305 of this title, a carrier, master or agent of the carrier, and a shipper shall, in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness (so far as the stipulation regarding seaworthiness is not contrary to public policy), or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea: *Provided,* That in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a nonnegotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect: *Provided,* That this section shall not apply to ordinary commercial shipments made in the ordinary course of trade but only to other shipments where the character or condition of the property to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

Apr. 16, 1936, c. 229, §6, 49 Stat. 1211.

§1307. Agreement as to liability prior to loading or after discharge

Nothing contained in this chapter shall prevent a carrier or a shipper from entering into any agreement, stipulation, condi-

tion, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

Apr. 16, 1936, c. 229, §7, 49 Stat. 1212.

§1308. Rights and liabilities under other provisions

The provisions of this chapter shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act, 1916, or under the provisions of sections 175, 181 to 183, and 183b to 188 of this title or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels.

Apr. 16, 1936, c. 229, §8, 49 Stat. 1212.

§1309. Discrimination between competing shippers

Nothing contained in this chapter shall be construed as permitting a common carrier by water to discriminate between competing shippers similarly placed in time and circumstances, either (a) with respect to their right to demand to receive bills of lading subject to the provisions of this chapter; or (b) when issuing such bills of lading, either in the surrender of any of the carrier's rights and immunities or in the increase of any of the carrier's responsibilities and liabilities pursuant to section 1305 of this title; or (c) in any other way prohibited by the Shipping Act, 1916, as amended.

Apr. 16, 1936, c. 229, § 9, 49 Stat. 1212.

§1310. Weight of bulk cargo

Where under the customs of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or ac-

cepted by a third party other than the carrier or the shipper, and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in this chapter, the bill of lading shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

Apr. 16, 1936, c. 229, § 11, 49 Stat. 1212.

§1311. Liabilities before loading and after discharge;; effect on other laws

Nothing in this chapter shall be construed as superseding any part of sections 190 to 196 of this title, or of any other law which would be applicable in the absence of this chapter, insofar as they relate to the duties, responsibilties, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

Apr. 16, 1936, c. 229, § 12, 49 Stat. 1212.

§1312. Scope of chapter; "United States", "foreign trade"

This chapter shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this chapter the term "United States" includes its districts, territories, and possessions. The term "foreign trade" means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this chapter shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions: *Provided, however,* That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this chapter, shall be subjected hereto as fully

as if subject hereto by the express provisions of this chapter: *Provided further*, That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this chapter.

April 16, 1936, c. 229, § 13, 49 Stat. 1212; Proc. No. 2695, July 4, 1946, 11 F.R. 7517, 60 Stat. 1352.

§1313. Suspension of provisions by President

Upon the certification of the Secretary of Commerce that the foreign commerce of the United States in its competition with that of foreign nations is prejudiced by the provisions, or any of them, of sections 1301 to 1308 of this title, or by the laws of any foreign country or countries relating to the carriage of goods by sea, the President of the United States may, from time to time, by proclamation, suspend any or all provisions of said sections for such periods of time or indefinitely as may be designated in the proclamation. The President may at any time rescind such suspension of said sections, and any provisions thereof which may have been suspended shall thereby be reinstated and again apply to contracts thereafter made for the carriage of goods by sea. Any proclamation of suspension or rescission of any such suspension shall take effect on a date named therein, which date shall be not less than ten days from the issue of the proclamation.

Any contract of the carriage of goods by sea, subject to the provisions of this chapter, effective during any period when sections 1301 to 1308 of this title, or any part thereof, are suspended, shall be subject to all provisions of law now or hereafter applicable to that part of said sections which may have thus been suspended.

Apr. 16, 1936, c. 229, § 14, Stat. 1213.

§1314. Effective date; retroactive effect

This chapter shall take effect ninety days after April 16, 1936; but nothing in this chapter shall apply during a period not to exceed one year following April 16, 1936, to any contract for the carriage of goods by sea, made before April 16, 1936, nor to any bill of lading or similar document of title issued, whether before or after such date in pursuance of any such contract as aforesaid.

Apr. 16, 1936, c. 229, § 15, 49 Stat. 1213.

§1315. Short title

This chapter may be cited as the "Carriage of Goods by Sea Act."

Apr. 16, 1936, c. 229, § 16, 49 Stat. 1213.

87-880

No. _____

Supreme Court, U.S.
FILED
NOV 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

GENERAL ELECTRIC COMPANY,

Petitioner,

—against—

M/V "NEDLLOYD ROUEN"

—and against—

NEDLLOYD LIJNEN B.V. (NEDLLOYD LINES),

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

RICHARD H. SOMMER
Counsel of Record

KIRLIN, CAMPBELL & KEATING
14 Wall Street
New York, New York 10005
(212) 732-5520

Attorneys for Respondent

J. SCOT PROVAN
BRADLEY F. GANDRUP, JR.
LAURENCE E. CURRAN, III
Of Counsel

STATEMENT REQUIRED BY SUPREME COURT RULE 28.1

Respondent Nedlloyd Lijnen B.V. (Nedlloyd Lines) is a wholly owned subsidiary and division of Royal Nedlloyd Group N.V. Other divisions of the Royal Nedlloyd Group N.V., which are affiliates of Respondent Nedlloyd Lijnen B.V. are:

Nedlloyd Bulk
Neddrill
Mammoet Transport
Nedlloyd Fleet Services
Damco International Transport
Transavia
Nedlloyd Energy

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L.J.K. Diplock, *Conventions and Moral Limitations Clauses in International Maritime Conventions*, 1 Journal of Maritime law and Commerce 524 (1970) .. 8

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IN THE

Supreme Court of the United States

OCTOBER TERM 1987

No. _____

GENERAL ELECTRIC COMPANY,

Petitioner,

—against—

M/V "NEDLLOYD ROUEN"

—and against—

NEDLLOYD LIJNEN B.V. (NEDLLOYD LINES),

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent, Nedlloyd Lijnen B.V. (hereinafter "respondent" or "Nedlloyd") respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The order of the United States Court of Appeals for the Second Circuit dated July 30, 1987 denying the Petition for a Rehearing with a Suggestion for Hearing *En Banc* is reproduced at Appendix A page 30a to the Petition. The opinion of the United States Court of Appeals for the Second Circuit affirming the judgment of the United States District Court for the Southern District of New York in favor of respondent Nedlloyd is reproduced at Appendix A pages 16a-29a to the Petition. That opinion is officially reported at 817 F.2d 1022

(2d Cir. 1987).[1] The opinion of the United States District Court for the Southern District of New York is reproduced at Appendix B pages 32a-40a to the Petition. That opinion is officially reported at 618 F. Supp. 62 (S.D.N.Y. 1985).

STATEMENT OF THE CASE

In February 1983, petitioner, General Electric Company, (hereinafter "petitioner" or "G.E.") as shipper and consignee, contracted with Nedlloyd, as vessel-owning ocean carrier, for the carriage of 26 items of cargo from Portsmouth, Virginia to Yenbu, Saudi Arabia. Two items were discharged damaged in Saudi Arabia. As a result, G.E. brought this maritime action in the United States District Court for the Southern District of New York to recover damages for breach of contract.

The District Court granted Nedlloyd's motion for partial summary judgment to limit its liability to $500 per package or customary freight unit pursuant to the United States Carriage of Goods by Sea Act, 46 U.S.C. § 1304(5) (West 1975) ("COGSA"). The District Court held Nedlloyd liable for damage to G.E.'s cargo in the amount of $28,500. G.E. appealed the District Court's ruling in favor of respondent Nedlloyd that Nedlloyd's *ad valorem* freight rate was reasonable and that its bill of lading provided adequate notice of the COGSA limitation of liability. The Court of Appeals affirmed the judgment of the District Court.

The Court of Appeals examined the contract of carriage between the parties expressed in the bill of lading. The Court of Appeals stated that petitioner's attacks on whether Nedlloyd's bill of lading provided adequate notice had already been held meritless in *Binladen BSB Landscaping v. M/V*

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1 The decision of the Court of Appeals for the Second Circuit was issued on May 6, 1987. Pursuant to a court order dated July 23, 1987, the Second Circuit issued an "errata" making minor modifications to its original opinion.

NEDLLOYD ROTTERDAM, 759 F.2d 1006, 1017 n.12 (2d Cir. 1985), *cert. denied*, 474 U.S. 902 (1985). Citing *Binladen*, the Court of Appeals stated that the language on the back of Nedlloyd's bill of lading incorporating COGSA and the space on the front for declaring excess value provided adequate notice of the COGSA limitation of liability and the means of avoiding it. Appendix A to Petition at 29a.

The Court of Appeals dismissed G.E.'s argument that Nedlloyd's *ad valorem* freight rate was unreasonable. The Court of Appeals noted that petitioner "never even inquired about making such a declaration, much less took steps towards actually declaring the value of its cargo." Appendix A to Petition at 28a. The court concluded that the lack of evidence with respect to G.E.'s investigation of Nedlloyd's *ad valorem* freight rate strongly suggested that G.E. made a business judgment not to explore the possibility of obtaining greater protection at a higher rate and that "the alleged excessiveness of Nedlloyd's *ad valorem* charge played no part in denying GE a fair opportunity to declare value." *Id.*

REASONS FOR DENYING THE WRIT

This case does not present the "special and important reasons" for this Court's review on Writ of Certiorari that are required by Supreme Court Rule 17.1. The decisions of the courts below are correct on the facts and on the law. The cases relied on by petitioner in order to suggest a conflict in decisions of the Circuit Courts of Appeal simply do not apply.

The United States Carriage of Goods by Sea Act, 46 U.S.C.A. § 1300 *et seq.* (West 1975) ("COGSA") limits an ocean carrier's liability for loss or damage to goods to $500 per package or customary freight unit "unless the nature and value of the goods have been declared by the shipper before shipment and inserted in the bill of lading." *Id.* at § 1304(5). Although not contained in COGSA, common law principles

provide that the carrier allow the shipper a "fair opportunity" to declare a value in excess of the $500 figure.

If a shipper opts to declare a value greater than $500, respondent Nedlloyd charges a ten percent *ad valorem* freight rate in exchange for waiving its limited liability. This *ad valorem* rate is published in respondent's tariff on file with the Federal Maritime Commission. Petitioner contends that respondent's *ad valorem* rate was unreasonable and effectively deprived it of a fair opportunity to declare a value greater than $500.

In its opinion below the United States Court of Appeals for the Second Circuit stated that consideration of "fair opportunity" requires analysis of two elements: first, whether or not the shipper received adequate notice of its right to declare a higher value; and second, the reasonableness of the carrier's *ad valorem* charge if the shipper decides to exercise that right. Appendix A to Petition at 27a. In its effort to comply with Supreme Court Rule 17 by alleging a conflict of decisions in the Circuit Courts of Appeal, petitioner cites a number of decisions all of which deal with the adequacy of notice. *See* Petition at 10-11 and cases cited therein. Petitioner, however, concedes in its pleadings to this Court that it had adequate notice. Petition at 28. Petitioner states: "[t]he carrier's tariff was filed with the U.S. Government, as required by law, and thus gave constructive notice to G.E." *Id.* Petitioner then advises that its "argument has never been that it did not know or should not have been charged with knowledge of NEDLLOYD's rate for declaring a value," but that even with knowledge respondent's *ad valorem* charge was unreasonable. *Id.*

In addition to conceding that it had constructive notice, petitioner has previously conceded that it also had actual notice. In its Petition for Rehearing with a Suggestion for Rehearing *En Banc*, petitioner stated at page 9: "[w]e agree with the Court's conclusion that G.E. obviously knew it could have declared a higher value. . . ."

Petitioner's concessions that it knew it could declare a higher value remove the adequacy of notice as an issue from this case. Consequently, the cases relied on by petitioner in support of the purported conflict, all focusing on the adequacy of notice, are simply not material to the specific issue that petitioner unsuccessfully presented below and now attempts to reargue to this Court: the alleged unreasonableness of respondent's *ad valorem* rate. However, even assuming, *arguendo*, that notice is still an issue, the purported conflict is illusory because the cases petitioner relies on are clearly factually distinguishable from one another and from this case.

Petitioner contends that the Second, Fourth, Fifth and Ninth Circuits have reached differing results in "fair opportunity" cases. *General Electric Co. v. M/V NEDLLOYD ROUEN*, 814 F.2d 1022 (2d Cir. 1987); *Cincinnati Milacron, Ltd. v. M/V AMERICAN LEGEND*, 804 F.2d 837 (4th Cir. 1986) (*en banc*) (*per curiam*); *Wuerttembergische v. M/V STUTTGART EXPRESS*, 711 F.2d 621 (5th Cir. 1981) (*per curiam*); *Brown & Root, Inc. v. M/V PEISANDER*, 648 F.2d 415 (5th Cir. 1981); *Nemeth v. General S.S. Corp.*, 694 F.2d 609 (9th Cir. 1982); *Komatsu, Ltd. v. States S.S. Co.*, 674 F.2d 806 (9th Cir. 1982); *Pan Am. World Airways v. California Stevedore & Ballast Co.*, 559 F.2d 1173 (9th Cir. 1977) (*per curiam*).

Petitioner incorrectly states that the Ninth Circuit "requires the bill of lading to recite the language of COGSA § 1304(5) so that a shipper will know that it can declare a value higher than $500 per package or customary freight unit." Petition at 10. The Ninth Circuit has merely stated that "an express recitation of [COGSA] section 4(5) is *prima facie* evidence that the shipper was given a fair opportunity to choose a higher liability." *Nemeth v. General S.S. Corp., Ltd.*, 694 F.2d 609, 611 (2d Cir. 1982); *see also Komatsu, Ltd. v. States S.S., Co.*, 674 F.2d 806 (9th Cir. 1982); *Pan Am World Airways v. California Stevedore and Ballast Co.*, 559 F.2d 1173 (9th Cir. 1977) (*per curiam*). The Ninth Circuit did not state, however, that the carrier could not prove that the shipper had notice

through other evidence. Therefore, the carrier could prove, for example, that the shipper had actual notice of its option to declare a higher value and elected not to do so.

Further, in both *Nemeth* and *Pan Am*, the Ninth Circuit found the fact that the bills of lading at issue contained no designated place for declaring an excess value was "relevant to the inquiry of whether there was a fair opportunity to choose between a higher or lower liability." *Nemeth*, 694 F.2d at 612 *citing Pan Am*, 559 F.2d at 1175. As observed by the District Court in this case, however, respondent's bill of lading "clearly contained a space entitled 'excess valuation' within which [petitioner] could have inserted a declaration of value." Appendix B to Petition at 35a. Consequently, based on the factual scenario at issue in this case, the Ninth Circuit could have reached precisely the same conclusion as the Second Circuit. Finally, the Ninth Circuit has recognized that these cases tend to be factually intensive as each bill of lading and tariff at issue contains different terms and conditions. *Komatsu, Ltd. v. States S.S. Co.*, 674 F.2d 806, 811 n.7 (9th Cir. 1982). It has reserved judgment as to whether a shipper would have adequate notice if the bill of lading or the tariff alerted the shipper to COGSA's $500 package limitation. *Id.*

In *Wuerttembergische v. M/V STUTTGART EXPRESS*, 711 F.2d 621 (5th Cir. 1983) (*per curiam*) and *Brown & Root, Inc. v. M/V PEISANDER*, 648 F.2d 415 (5th Cir. 1981) the Fifth Circuit also considered the adequacy of notice to the shipper of its option to declare a higher value. Although the Fifth Circuit differed slightly from the Ninth as to the effect of a bill of lading's incorporation of COGSA by reference, the "key conclusion" reached by the Fifth Circuit in both cases was "that the published tariff of the carrier is law and is controlling." *Wuerttembergische*, 711 F.2d at 622; *Brown & Root*, 648 F.2d at 425. In both cases the Fifth Circuit held that the "carrier proved (by the tariff) the availability of choice of valuation." *Brown & Root*, 648 F.2d at 425. In both cases the Fifth Circuit also noted that the tariffs at issue were quite specific. As noted above, the Ninth Circuit has reserved judg-

ment as to whether a shipper would receive adequate notice if either the bill of lading or the tariff alerted the shipper to the package limitation. *Komatsu, Ltd. v. States S.S. Co.*, 674 F.2d 806, 811 n.7 (9th Cir. 1982). Therefore, if the reference to the package limitation in either a bill of lading or a tariff was "sufficiently explicit to make a shipper aware that a package limitation exists . . . ," the Ninth Circuit could concur with the Fifth. *Id.* at 811.

The Fourth Circuit has recently held, *en banc*, in *Cincinnati Milacron, Ltd. v. M/V AMERICAN LEGEND*, 804 F.2d 837 (4th Cir. 1986) (*en banc*) (*per curiam*), that a shipper received adequate notice, and therefore "fair opportunity," from the carrier's short form bill of lading which incorporated its long form bill of lading by reference, which in turn contained the applicable provisions of COGSA.

In its opinion below the Second Circuit accurately stated as to the adequacy of notice issue that "[*p*]*rima facie* evidence of [fair] opportunity is established when it can be gleaned from the language contained in the bill of lading." Appendix A to Petition at 29a. The Second Circuit then held, relying on its earlier decision in *Binladen BSB Landscaping v. M/V NEDLLOYD ROTTERDAM*, 759 F.2d 1006, 1017 n.12 (2d Cir. 1985), *cert. denied*, 474 U.S. 902 (1985), construing the identical bill of lading at issue before this Court, that "the language on the back of the Nedlloyd document incorporating COGSA's provisions and the space for declaring excess value on the front are sufficient notice of the limitation and the means of avoiding it." Appendix A to Petition at 29a.

These appellate court opinions are all based on unique and differing factual circumstances. The result in each flows primarily from the differing terms and conditions contained in the bills of lading and tariffs at issue. Consequently, even assuming *arguendo* that adequacy of notice remains an issue in this case, the alleged circuit court conflict concerning precisely what will adequately notify a shipper of its option to declare a

higher value is illusory because the cases turn on their specific facts.

As noted above, since petitioner has conceded that it had both actual and constructive notice, these cases simply have no bearing on the specific issue petitioner raises: the reasonableness of respondent's *ad valorem* freight rate. No conflict exists among the circuits as to this issue.

It is doubtful that the reasonableness of one ocean carrier's *ad valorem* freight rate is of sufficient moment to warrant consideration by this Court. As stated by Lord Diplock of the House of Lords, "[t]he option to declare a higher value is practically never exercised." *Mitsui & Co., Ltd. v. American Export Lines, Inc.*, 636 F.2d 807, 815-816 n. 9 (2d Cir. 1981) *quoting* L.J.K. Diplock, *Conventions and Moral Limitations Clauses in International Maritime Conventions*, 1 Journal of Maritime Law and Commerce 524, 529 (1970). Therefore, the issue of the reasonableness of a carrier's *ad valorem* freight rate simply never arises.

The Second Circuit has noted that "one obvious reason" that shippers never declare a higher value is that all risks marine insurance provides a shipper or consignee with much more comprehensive coverage than that provided by declaring a higher value. This is because in the latter case the carrier retains all of its COGSA defenses to liability contained in 46 U.S.C. § 1304(2). *Mitsui*, 636 F.2d at 815-816, n.6. As observed by the Second Circuit:

> "declaration of value and payment of higher *ad valorem* rates benefits the shipper or consignee only when the carrier is liable. Shippers, consignees and persons financing maritime transactions insist on insurance that will protect against all risks of shipment including loss or damage attributable to such causes as acts of the crew, fire, and perils of the sea, not just those risks for which recovery maybe had under COGSA."

Id.; *see also Berisford Metals Corp. v. S/S SALVADOR*, 1986 A.M.C. 99, 101 (S.D.N.Y. 1985) (not otherwise reported) (noting declaration of a higher value is very rare because "[i]t is apparently far cheaper to obtain insurance for the shipment which would be necessary in any event and not to declare the excess value."); *see generally* G. Gilmore & C.L. Black, Jr., *The Law of Admiralty* § 3-47 (2d ed. 1975).

In this case petitioner had purchased and was covered by an all risks marine insurance policy in connection with the ocean carriage of its cargo. Joint App. in 2d Cir. at 394-416. Indeed, the District Court noted that petitioner had never declared the excess value of any of its cargoes in order to avoid the COGSA limitation in the 43 years of one employee's experience with petitioner.

Even if this Court were to conclude that the reasonableness of one ocean carrier's *ad valorem* freight rate was of sufficient importance to warrant its consideration, this would not be the appropriate case for that consideration. As indicated by the Second Circuit, petitioner "never even inquired about making such a declaration, much less took steps towards actually declaring the value of its cargo." Appendix A to Petition at 28a. The Second Circuit concluded that petitioner was therefore estopped from arguing that Nedlloyd's *ad valorem* freight rate was excessive. *Id.* The court stated: "[a]s an experienced shipper, GE obviously knew that it could declare a higher value. The lack of evidence with respect to GE's investigation of Nedlloyd's *ad valorem* charge strongly suggests that '[t]hey made a business judgment . . . not to explore the possibility of obtaining greater protection . . . at [a] higher rate.' " *Id. quoting First Pennsylvania Bank N.A. v. Eastern Airlines Inc.*, 731 F.2d 1113, 1122 (3d Cir. 1984). The court further concluded that "the alleged excessiveness of Nedlloyd's *ad valorem* charge played no part in denying GE a fair opportunity to declare value. Instead, it was GE's own cost benefit analysis that prevented it from taking such a step." Appendix A to Petition at 28a-29a. Nedlloyd's *ad valorem* freight rate could have been one tenth of one percent, ten percent, or greater, and

it simply would not have made any difference whatsoever to petitioner's decision to enjoy the benefit of ocean carriage at a reduced freight rate in consideration of allowing Nedlloyd to limit its liability pursuant to § 1304(5) of COGSA.

CONCLUSION

The issue of the adequacy of notice is not before this Court as petitioner has conceded that it had both actual and constructive notice. There is no conflict in the circuits as to the reasonableness of an ocean carrier's *ad valorem* freight rate. Further, the reasonableness of one ocean carrier's *ad valorem* freight rate does present the "special and important reasons" for this Court's review required by Supreme Court Rule 17.1. To the extent that petitioner's other questions and/or arguments have not been addressed by respondent, they do not present questions sufficient to invoke the jurisdiction of this Court pursuant Supreme Court Rule 17.1.

For the foregoing reasons, respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD H. SOMMER
Counsel of Record

KIRLIN, CAMPBELL & KEATING
14 Wall Street
New York, New York 10005
(212) 732-5520

Attorneys for Respondent

J. SCOT PROVAN
BRADLEY F. GANDRUP, JR.
LAURENCE E. CURRAN, III
Of Counsel